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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FEDERAL ELECTRIC CORPORATION, *Petitioner*

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OCTOBER TERM, 1973

No.

FEDERAL ELECTRIC CORPORATION, *Petitioner*

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Federal Electric Corporation, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Claims in this proceeding.

OPINIONS BELOW

The opinion of the Court of Claims, as yet unreported, appears in Appendix A, *infra*, pages 1a-14a. The order of the Court of Claims denying petitioner's motion for rehearing, also unreported, appears in Appendix B, *infra*, page 15a. The opinion of the Armed

Services Board of Contract Appeals ("ASBCA") is reported at 68-1 BCA ¶ 6834, and appears in Appendix C, *infra*, pages 16a-38a.

JURISDICTION

The judgment of the Court of Claims was entered on January 23, 1974. The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 23, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1) (1970).

QUESTIONS PRESENTED

1. Whether, contrary to the decision of the Court of Claims in this case, the Uniform Commercial Code ("UCC") is the controlling federal law applicable to disputes under Government contracts in the absence of otherwise applicable federal statutes or regulations, as has been held by the Court of Appeals for the Second Circuit and other federal courts.

2. Whether the UCC has now superseded previous judicial decisions as controlling authority in disputes under Government contracts, when there are no otherwise applicable federal statutes or regulations.

3. Whether the acquisition by the United States of goods at unreasonably low prices under a Government contract which is unenforceable and has been validly rescinded is a taking of private property without just compensation, in violation of the Fifth Amendment to the Constitution.

4. Whether the Court of Claims properly disregarded well-established standards, set forth in applicable statutes and in the decisions of this Court, with respect to the construction of Government contracts.

5. Whether the Government may place reprocurement orders under an indefinite quantity contract for the sole benefit and account of a defaulted Government contractor, in violation of the Armed Services Procurement Regulation (ASPR) and contrary to the previous interpretations and agreements of the parties.

STATUTES INVOLVED

The relevant provisions of the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. § 2304 *et seq.* (1970), as implemented by the Armed Services Procurement Regulation (ASPR), §§ 7-103.12 (Disputes), 8-701(a) (Termination for Convenience of the Government), 8-602.6 (Repurchase Against Contractor's Account) and 1-309 (Solicitations for Informational or Planning Purposes) (1965); the Uniform Commercial Code, § 1-207; the Defense Production Act of 1950, 50 U.S.C. §§ 2071-73 (1970), as amended and extended; and the Fifth Amendment to the Constitution of the United States are set forth in Appendix D, *infra*, pages 39a-52a.

STATEMENT OF THE CASE

This case arises out of a contract between petitioner and the United States Government, acting through the Department of the Air Force, entered into on December 17, 1965. The contract called for the production and purchase of an indefinite quantity of five types of mobile generator sets of various sizes and capacities. The contract provided that the Government would order a minimum quantity of 453 generators and reserved the Government's right to place additional orders for generators up to a maximum quantity of 3,600 within a period of 12 months beginning one day after the effective date of the contract.

The contract specifically prohibited the Government from issuing orders for the minimum quantity simultaneously with the effective date of the contract. At the same time, by means of the standard Termination clause, the Government reserved the right to terminate the entire contract before issuing orders for the minimum quantity.[1] In accordance with these provisions, the order for the minimum quantity was not placed by the Air Force contemporaneously with the effective date of the contract. To the contrary, the order for the minimum quantity was not issued by the Air Force until three days after the effective date of the contract.

The contract also contained a Disputes clause of the type normally found in Government supply contracts.[2] This clause required petitioner to continue performance and pursue its administrative remedies under the contract in the event that a dispute with the Government arose during performance.

Some time after petitioner's acceptance of the first two delivery orders under the contract, petitioner became aware of certain errors in its proposal for the contract which resulted in petitioner's incurring substantial unanticipated losses on each generator ordered by the Air Force. Petitioner advised the Air Force of the errors, and informed the Air Force that it was withdrawing its offer to supply any additional generators, other than those which had already been ordered. Petitioner contended that the contract was void

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[1] The standard Termination clause is considered in *John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381, 390, 325 F.2d 438, 442 (1963), *cert. denied*, 377 U.S. 931 (1964).

[2] The standard Disputes clause is set forth and considered in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 710 (1963).

ab initio because it did not contain any binding consideration running from the Government to petitioner. At the time of award, all that the Government promised was to place orders at some future date; but the Government also retained the right under the Termination clause of the contract to rescind or revoke its promise or to terminate the contract for its convenience and at its discretion.[3] The Government's promise was thus illusory, and the contract was one-sided and unenforceable.

In accordance with the Disputes clause of the contract, petitioner also informed the Air Force on March 29, 1966, that it would continue to manufacture, under protest, any additional generators ordered by the Air Force, without prejudice to its right to recover, in an appropriate administrative or judicial proceeding, the reasonable price for the delivery of such generators. Thereafter, the Air Force placed orders for 2,174 additional generators and made payment to petitioner only at the erroneously low prices set forth in the contract. Petitioner thus seeks in this litigation to recover the difference between the erroneous contract prices and the reasonable prices for these generators.

Prior to the time that petitioner and the Government entered into the contract, the Government, acting through the same Air Force procuring activity, entered into a similar contract with another company, Bogue Electric Company ("Bogue"), for substantially similar generators. The Bogue contract was terminated for default on November 19, 1965, approximately one month prior to the execution of the contract between petitioner and the Government. On January 31, 1966,

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[3] *Supra*, note 1.

after the execution of the contract with petitioner, the Air Force issued a "Request for Proposal" to reprocure a quantity of generators "for the account" of Bogue. This reprocurement was in accordance with the provisions of the Default clause in the contract between Bogue and the Air Force. Pursuant to that clause, Bogue was liable for the difference between the unit price set forth in its contract and the unit price at which the Air Force reprocured the defaulted generators.

Four proposals were received by the Air Force in response to the Bogue reprocurement request, including one from petitioner. Petitioner's proposed prices were the lowest among the four offerors. However, petitioner's proposed prices were substantially higher than the erroneous prices set forth in the contract between petitioner and the Government.

At the invitation of the Air Force, negotiations were entered into by petitioner and the Air Force under the Bogue reprocurement request. During the negotiations, the Air Force offered petitioner additional consideration to permit the Government to reprocure the defaulted Bogue units under petitioner's contract, and so stipulated before the Armed Services Board of Contract Appeals (ASBCA). However, petitioner refused this offer. An agreement was subsequently reached on prices and other terms under the Bogue reprocurement request, subject to availabliity of funds and approval of higher authority. The prices agreed upon were comparable to those which petitioner had quoted in its original response to the reprocurement request and, significantly, were as much as $2,700 per unit higher than the erroneous prices set forth in the basic contract with petitioner. The Government stipulated before the

ASBCA that these higher prices were "fair and reasonable."

Some time after March 1966, the Air Force reversed its position, abandoned the Bogue reprocurement request, and determined to reprocure the defaulted Bogue units under petitioner's contract at the erroneous prices set forth in that contract. On April 15 and June 13, 1966, the Air Force issued delivery orders under the contract to reprocure 753 units for the account of Bogue. Alternatively, petitioner thus seeks in this litigation to recover the difference between the erroneous prices set forth in the contract and the reasonable prices for the generator reprocured by the Air Force for Bogue's account.

Petitioner sought to recover the difference between the erroneous prices and its actual costs through administrative procedures provided for in the Disputes clause of its contract with the Government. In an opinion rendered on January 26, 1968, the Armed Services Board of Contract Appeals denied petitioner's claims under the contract. The Board held that the contract was legally enforceable as to all orders issued thereunder and at the prices set forth therein. The Board further held that the requirement in ASPR § 8-602.6(a) that the contracting officer reprocure defaulted units at "as reasonable a price as practicable" means at the "lowest practicable price," and that the Air Force was only "testing the market" when it issued the Bogue reprocurement request. (68-1 BCA at 31, 598; Appendix C, page 36a).

On January 21, 1973, petitioner appealed the ASBCA decision to the United States Court of Claims. The appeal sought review of the ASBCA decision pursuant to the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1970).

Petitioner contended that the Government breached the contract by its insistence upon petitioner's continued performance at the erroneous prices set forth in the contract and by its demand that petitioner fill orders for the account of another contractor. Finally, petitioner contended that the Government's actions under the contract constituted a taking of petitioner's property without just compensation within the meaning of the Fifth Amendment to the Constitution.

On October 25, 1973, the Court of Claims granted the Government's cross-motion for summary judgment and dismissed petitioner's appeal. With respect to the enforceability of the contract, the court adopted the result reached by the ASBCA, but declined to follow its reasoning. Although the court recognized that recent federal court decisions have applied the provisions of the UCC to disputes arising under Government contracts, it refused in this case to apply those provisions. The court substantially followed the reasoning of the Board with respect to the Bogue reprocurement issue. It did not reach petitioner's contentions under the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

This case raises issues of substantial and compelling national importance to the law applicable to disputes under Government contracts. It presents to this Court for the first time the basic question of whether the Uniform Commercial Code, which has been adopted by 49 states and by Congress for the District of Columbia, is the prevailing "federal common law" applicable to disputes under Government contracts in the absence of otherwise applicable federal statutes and regulations. As we show below, the decisions of the lower federal

courts are directly in conflict with respect to this matter. In addition, this case presents the question of whether the Court of Claims may properly disregard well-settled principles, set forth in applicable statutes and in the decisions of this Court, with respect to the construction of Government contracts. The prompt resolution of these questions by this Court is a matter of genuine importance for the fair and orderly administration of Government contracts.

The uncertainty and confusion regarding the proper status of the UCC in disputes arising under Government contracts are the result of a decision rendered by this Court more than 50 years ago. The Court of Claims stated in this case that, although it "might find persuasive the contemporary view of performance under protest as restated in Section 1-207 of the Uniform Commercial Code . . . , we hesitate to extend this view in the face of a clear, contrary rule established and affirmed, albeit a half century ago, by the Supreme Court."[4] (Appendix A, page 9a) The "contrary rule" to which the court referred as governing authority is the decision of this Court in *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489 (1923). On the basis of *Willard Sutherland*, the Court of Claims held that petitioner's contract was valid to the extent that petitioner performed thereunder, although the contract contained a Disputes clause and petitioner's performance was under protest.

In electing to follow what Judge Nichols, concurring, described as "elderly" decisions of this Court, and dis-

[4] UCC § 1-207 provides: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved . . . ."

regarding the currently prevailing view of performance under protest as set forth in the UCC, the Court of Claims ignored the recent trend of its own decisions. Those decisions have consistently recognized the UCC as a principal source of the federal common law for purposes of Government contracts. *See Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 455 F.2d 546 (1972); *Harry Thuresson, Inc.* v. *United States,* 197 Ct. Cl. 88, 453 F.2d 1278 (1972); *Everett Plywood & Door Corp.* v. *United States,* 190 Ct. Cl. 80, 419 F.2d 425 (1969).

Additionally, the decision of the Court of Claims in this case is directly in conflict with the landmark decision of the Court of Appeals for the Second Circuit in *United States* v. *Wegematic Corp.,* 360 F.2d 674 (2d Cir. 1966). In an opinion by Chief Judge Friendly, the Second Circuit held in *Wegematic* that the UCC is an important source of the federal common law regarding Government contracts. The court emphasized that it would be a "distinct disservice" to disregard the UCC, as did the Court of Claims here. *Id.* at 676.

The conflict between the Court of Claims and the Second Circuit regarding the applicability of the UCC to disputes under Government contracts has already resulted in substantial uncertainty in the administration of Government contracts. The confused state of the law in this area is reflected in decisions of the administrative boards of contract appeals. Consistent with *Wegematic,* some of those decisions recognize the UCC as the most reliable source for determining the federal common law applicable to Government contracts. *See, e.g., Garrity Co.,* ASBCA No. 12174, 67-2 BCA ¶6586. Others, however, like the Court of Claims in this proceeding, have refused to apply the require-

ments of the UCC. *See, e.g., Meeks Transfer Co.*, ASBCA No. 11819, 68-1 BCA ¶ 7063. It is important that this Court act promptly to dispel the confusion and uncertainty regarding the applicability of the UCC in disputes arising under Government contracts.

A separate question in this proceeding involves the Government's reprocurement rights in the event of default by a Government contractor. The resolution of this question is also of substantial importance to the law of Government contracts. The issue in this case is whether the Government may ignore the guidelines set forth by applicable statutes, as implemented by the Armed Services Procurement Regulation, and by the decisions of this Court with respect to the constuction of Government contracts.

I. The Decision of the Court of Claims Is in Conflict with Decisions of the United States Court of Appeals for the Second Circuit and Other Federal Courts as Well as With Its Own Earlier Decisions.

The Court of Claims in this case held that it was unnecessary for it to resolve the central issue of the unenforceability *ab initio* of petitioner's contract with the Government, since the "present case is governed by" the decision of this Court in *Willard, Sutherland & Co.* v. *United States, supra.* (Appendix A, page 7a). The court held that under the *Willard, Sutherland* rule, petitioner was bound to the erroneous contract price for all of the generators which it delivered, regardless of whether its performance was under protest.

The Court of Claims stated:

> Though we might find persuasive the contemporary view of performance under protest as restated in Section 1-207 of the Uniform Commercial

> Code and accepted by the court under the special circumstances of the *Northern Helex* case, we hesitate to extend this view in the face of a clear, contrary rule established and affirmed, albeit a half century ago, by the Supreme Court. We are reminded in this connection of the Court's recent expression of "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of [the Supreme] Court." *United States* v. *Mason*, 412 U.S. 391 (1973).

What the Court of Claims referred to as the "contemporary view" of performance under protest is embodied in Section 1-207 of the Uniform Commercial Code. The Section provides that a party, such as petitioner, which performs "with explicit reservation of rights . . . does not thereby prejudice the rights reserved . . . ." Although there is no specifically applicable provision in the Armed Services Procurement Regulation,[5] the contractual requirement of continued performance, contained in the standard Disputes clause, obviously indicates that such performance will not take place at the expense of the contractor's specifically reserved legal rights.

As shown in Section II of this petition, *Willard, Sutherland* is inapplicable to this case on its facts be-

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[5] The Armed Services Procurement Act of 1947, as amended, 10 U.S.C. § 2304 *et seq.* (1970), is the organic statute authorizing the Department of Defense to issue procurement regulations. These regulations are known collectively as the Armed Services Procurement Regulation (ASPR) and are codified in Title 32 of the Code of Federal Regulations. This Court has held that the provisions of ASPR have the full force and effect of law. *Paul* v. *United States*, 371 U.S. 245, 255 (1963). *See G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1, 312 F.2d 418, *rehearing denied*, 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

cause of the presence of a modern Disputes clause in petitioner's contract and because of the valid rescission of petitioner's contract. However, it is important to note at this point that, regardless of *Willard, Sutherland,* the refusal of the Court of Claims to apply the UCC in this case directly conflicts with prior decisions of that court and with decisions of the United States Court of Appeals for the Second Circuit and other federal courts. It also conflicts with the reasoning of this Court in *Priebe & Sons, Inc.* v. *United States,* 322 U.S. 407, 411 (1947).[6]

In 1947, this Court stated in *Priebe* that:

> It is customary, where Congress has not adopted a different standard, *to apply to the construction of Government contracts the principles of general contract law. United States* v. *Standard Rice Co.,* 323 U.S. 106, 111 and cases cited. [Emphasis added.]

There can be no question of the dramatic impact of the Uniform Commercial Code on the "principles of general contract law." The Code has been adopted by 49 states and by Congress for the District of Columbia. *See United States* v. *Hext,* 444 F.2d 804, 811 (5th Cir. 1971). A review of the Court of Claims and other federal court decisions rendered since the publication of

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[6] Judge Nichols, concurring in the Court of Claims decision in this proceeding, suggested that the court should not have departed from the reasoning of the ASBCA.

> One beauty (among many) of the Board's opinion is that it avoids the Scylla and Charybdis between which this court, on its chosen course, must pass: that is, either we must ignore what we call "the contemporary view of performance under protest" or we must presumptuously overrule some elderly Supreme Court decisions. (Appendix A, page 13a).

the UCC, as well as the decisions of the Government boards of contract appeals, indicates that application of the Code to disputes under Government contracts in the absence of otherwise applicable statutes or regulations is the *rule* and not the exception. Accordingly, the decision of the Court of Claims in this proceeding is contrary to the prevailing law.

It is a matter of genuine importance that the proper function of the UCC in Government contracts disputes be expeditiously resolved. As one commentator has emphasized, the "uniform application of an independent federal common law" is essential to protect federal contracts from the multiplicity of litigation which inevitably results from confusion with respect to the applicable law. Gusman, *Article 2 of the UCC and Government Procurement: Selected Areas of Discussion,* 9 B.C.Ind. & Com.L.Rev. 1, 3 (1967).

The landmark case in this field is *United States* v. *Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966), an action by the United States seeking damages for delay under a Government computer contract. Chief Judge Friendly stated for the Second Circuit:

> We find persuasive the defendant's suggestion of looking to the Uniform Commercial Code as a source for the "federal" law of sales. *The Code has been adopted by Congress for the District of Columbia,* 77 Stat. 630 (1963), *has been enacted in over forty states and is thus well on its way to becoming a truly national law of commerce,* which, as Judge L. Hand said of the Negotiable Instruments Law, is "more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson." New York, N.H. & H.R. Co. v. Reconstruction Finance Corp., 180 F.2d 241, 244 (2 Cir.

> 1950). *When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States.* [360 F.2d at 676; emphasis added.]

Contrary to its position before the Court of Claims, the Government has frequently acknowledged the applicability of the U.C.C. to federal contracts. *Wegematic* has substantial progeny; and no contrary authority among the circuit courts of appeals exists. *See United States* v. *Heat, supra,* 444 F.2d at 809-811 (5th Cir.); *Grain Merchants, Inc.* v. *Union Bank,* 408 F.2d 209, 218 (7th Cir. 1969); *United States* v. *National Optical Stores Co.,* 407 F.2d 759, 761 n. 3 (7th Cir. 1969); *United States* v. *First National Bank of Boston,* 203 F.Supp. 298, 300 (D. Mass. 1967) (per Judge Wyzanski).

Similarly, the Court of Claims accepted and relied upon the U.C.C. in *Everett Plywood & Door Corp.* v. *United States, supra,* 190 Ct. Cl. at 89-90, 419 F.2d at 430, where the court quoted with approval the language of Chief Judge Friendly in *Wegematic.* In *Harry Thuresson, Inc.* v. *United States, supra,* the court also found support for its decision in the U.C.C., which, as it acknowledged, "*we have applied in the past.*" (197 Ct. Cl. at 97, 453 F.2d at 1282; emphasis added). *See also Armstrong Metals & Plastics Co.* v. *United States,* No. 239-70, Trial Judge Opinion (Sept. 17, 1973).

In *Northern Helex Co., supra,* to which the Court of Claims referred in its opinion, the court adhered to the "more modern position" of the UCC and lauded the "fairness of following the modern UCC rule," which

permits continued performance under protest after a breach of contract by the Government. The *very same* UCC provision which was at issue in *Northern Helex* is also at issue, here, and was distinguished, erroneously, by the Court of Claims. In *Northern Helex*, the court stated as follows:

> We reject the contractor's point that in fact defendant consented to continued performance, but adhere to the more modern position of the Uniform Commercial Code, in its Section 1-207, that the opponent's assent is not a prerequisite. "As always, the federal contract law we apply should take account of the best in modern decision and discussion." *Pabloc Co.* v. *United States*, 161 Ct. Cl. 369, 377 (1963). *This court has explicitly recognized the authority and relevance of the Uniform Commercial Code in the field of public contracts. Everett Plywood & Door Corp.* v. *United States*, [*supra*] . . . , as has the Second Circuit, *United States* v. *Wegematic Corp.*, [*supra*] . . . . See, also, *Harry Thuresson, Inc.* v. *United States*, [*supra*] . . . .
>
> We are convinced of the fairness of following the modern UCC rule in this case because of the harshness of a contrary result on our special facts, where cessation of production was commercially impossible and avoidance of waste most desirable. As Wiliston explains the rationale behind the strict doctrine of election of remedies (Williston, *Contracts, supra*, sec. 684), that theory has little impact here. He says: "The law simply does not, under the circumstances, permit a party to exercise two alternative or inconsistent rights or remedies." In this instance, continued delivery was not an inconsistent, voluntarily chosen, course of action, but an indispensable route which was the only practicable one. [197 Ct. Cl. at 130, 455 F.2d at 553-554; emphasis added.]

The course of action followed by petitioner in this case—namely, performance under protest—was also an "indispensable route." Petitioner was required here to continue performance by virtue of the Disputes clause in its contract and by virtue of directives issued by the Business and Defense Services Administration (BDSA) of the Department of Commerce.[7] There are civil and criminal penalties in the Defense Production Act for the willful violation of such BDSA directives.[8]

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[7] The BDSA, now renamed the Bureau of Domestic Commerce (BDC), under the authority of the Defense Production Act of 1950, 50 U.S.C. §§ 2071-73 (1970), as amended and extended, operates the Defense Materials System (DMS). That system consists of a body of regulations, orders and procedures designed to channel the flow of materials and products to the nation's vital military defense, atomic energy, space, construction and research and development programs, by setting priorities for the purchase and supply of materials by and to Government prime contractors and subcontractors at every tier.

[8] The Court of Claims also erred in attempting to distinguish this case from *Northern Helex* on the grounds of the alleged "special circumstances" in *Northern Helex*. "Special" circumstances are also present here. Additionally, the court failed to point out that *Northern Helex* rested, "equally," on the significant facts that the contractor in that case had made an express reservation of its rights (197 Ct. Cl. at 128-29, 455 F.2d at 552-53); and that the "Government was not hurt and it did not change its position." (197 Ct. Cl. at 130, 455 F.2d at 554).

Petitioner meets both of the two co-equal criteria set forth by the Court of Claims in *Northern Helex*. Petitioner can point both to the "particular circumstances" of this case, *e.g.*, the presence of a modern disputes clause, the applicability of BDSA directives carrying civil and criminal penalties, and the Government requirements for the ordered generators for the Vietnam War; and to "special facts," *e.g.*, petitioner made an express protest and reservation of its rights, and the Government was not hurt (but rather, benefitted) by petitioner's continued performance and did not change its position in reliance thereon.

The boards of contract appeals have also recognized the applicability of the UCC to the resolution of disputes under Government contracts in the absence of otherwise applicable statutes and regulations. *See General Elec. Co.*, IBCA No. 442-6-64, 65-2 BCA ¶ 4974 (§ 2-317 cited in support of cumulation of warranties); *Mazur Bros. & Jaffe Fish Co.*, VACAB No. 512, 65-2 BCA ¶ 4932 (§§ 2-602(1), 2-606, and 2-607 cited to show acceptance of supplies); *Carpenter Steel Co.*, AECBCA No. 5-65, 65-1 BCA ¶ 4848 (§ 2-202 used to support admission of prior negotiations); *Federal Pac. Elec. Co.*, IBCA No. 334, 1964 BCA ¶ 4494 (§ 2-317 cited for cumulation of remedies); *Reeves Sounderaft Corp.*, ASBCA Nos. 9030, 9130, 1964 BCA ¶ 4317 (§ 2-315 cited for implied warranty of fitness for particular purpose and § 2-316(3) to negate warranty).[9]

Finally, the commentators have also recognized that the Uniform Commercial Code applies to the resolution of disputes under Government contracts in the absence of otherwise applicable statutes and regulations. For example, retired Chief Justice Traynor of the California Supreme Court has stated in a comprehensive article that:

> The Uniform Commercial Code has become a major influence in the development of common law

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[9] In the past, the Uniform Sales Act, which was modified and supplanted by Article II of the UCC, was regarded as a source of principles for use in deciding Government contract cases. *See Whitin Mach. Works* v. *United States*, 175 F.2d 504 (1st Cir. 1949); *Cudahy Packing Co.* v. *United States*, 109 Ct. Cl. 833, 75 F. Supp. 239 (1948); *United States* v. *Hamden Co-operative Creamery Co.*, 185 F. Supp. 541 (E.D. N.Y. 1960); *J. R. Simplot Co.*, ASBCA No. 3952, 59-1 BCA ¶ 2112, *modified on mot. for recon.*, 59-2 BCA ¶ 2306.

> in the federal courts to govern cases involving government contracts and other commercial transactions. Judge Friendly, speaking for the Court of Appeals for the Second Circuit, has reinforced with appellate approval the established practice of lower courts and federal agencies to make use of the Code as a source of federal law. He notes that its widespread enactment put it "well on its way to becoming a truly national law of commerce" and that this promise of uniformity would be disserved if transactions with the government were not subject to kindred rules. [17 Cath.U.L.Rev. 401, 422-23 (1967); footnotes omitted]

In summary, the Court of Claims decision in this case is in direct conflict with: (1) the decision of this Court in *Priebe* v. *United States, supra;* (2) prior decisions of the Court of Claims which recognize the "authority and relevance" of the Uniform Commercial Code in the field of public contracts; (3) decisions of the Second Circuit and other federal courts which have held the Code applicable to disputes arising under Government contracts; (4) applicable statutes, such as the Armed Services Procurement Act of 1947, as implemented by the Armed Services Procurement Regulation, which has the full force and effect of statutory law, and the Defense Production Act of 1950, as implemented by the Department of Commerce BDSA regulations; and (5) the Fifth Amendment to the Constitution.

The inconsistencies in the Court of Claims decision, the conflict between that decision and the decisions of other federal courts, and the court's failure to adhere fully to this Court's decision in *Priebe* have created substantial uncertainty and confusion with respect to the law applicable to Government contract disputes. The

resolution of that uncertainty by this Court is a matter of urgent national importance.

II. The Court of Claims Erroneously Considered Itself Bound by a Decision of This Court Which Is Inapplicable to This Case on Its Facts.

As stated above, the Court of Claims held with apparent reluctance that it could not reach the question of the unenforceability *ab initio* of petitioner's contract with the Government because "the present case is governed by" this Court's decision in *Willard, Sutherland & Co.* v. *United States, supra.* In the absence of *Willard, Sutherland,* the court stated that it might have found persuasive the contemporary view of performance under protest as set forth in Section 1-207 of the UCC. (Appendix A, page 9a)

The Court of Claims obviously erred in concluding that it could not reach the question of the unenforceability of petitioner's contract. *Willard, Sutherland* is clearly inapplicable because, unlike the contract here, the contract in *Willard, Sutherland* was not impacted by BDSA directives and did not contain a modern Disputes clause which required performance during the pendency of a dispute and because in this case petitioner not only registered a "prior protest" but, moreover, effectively terminated and rescinded the contract. In this case, unlike *Willard, Sutherland,* no contract existed under which the Government could issue any additional orders.

Willard, Sutherland concerned a contract for the purchase by the Government of an indefinite quantity of coal. This Court held that there was nothing in the

contract which required the Government to take or limited its demand to any ascertainable quantity, and accordingly held that " . . . for lack of consideration and mutuality, the contract was not enforceable." (262 U.S. at 493).

However, the Court held that the contractor in *Willard, Sutherland* was bound to the contract price to the extent that it had performed. It held "to no avail" an early protest by the contractor which the Government had refused to accept, and concluded that the contractor's deliveries were "voluntary." (262 U.S. at 494).

In contrast, petitioner's deliveries in this case were not "voluntary." Petitioner here acted under the compulsion of BDSA directives and a Disputes clause which obligated it to comply with any order issued by the contracting officer, albeit under protest. Thus, the Disputes clause, and the BDSA directives, which have the force and effect of statutory law,[10] effectively reversed *Willard, Sutherland* with respect to performance under protest, making the UCC applicable. In light of the Disputes clause and of the BDSA directives, petitioner's performance under protest obviously was not voluntary, and the claim of acquiescence asserted successfully by the Government in *Willard, Sutherland* is simply irrelevant here.

There is yet another reason why the *Willard, Sutherland* decision is inapplicable here. There is no disagreement between the parties with respect to the fact that the basic contract was unenforceable. The Government has admitted that petitioner could have de-

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[10] *See* note 5, *supra*.

cleared the contract cancelled and would not have been liable for breach.[11] Petitioner did, in fact, cancel the contract by letter to the contracting officer dated March 29, 1966. The Government has thus essentially admitted that no contract existed between the parties after March 29, 1966. Since the rule stated in *Willard, Sutherland* applies only to an existing contract, that rule is clearly inapplicable here.

In these circumstances, the Court of Claims plainly erred in applying *Willard, Sutherland* and in holding that the UCC is inapplicable to this case. Unless the Court of Claims decision is reviewed by this Court, and guidance provided with respect to the proper application of the UCC to Government contracts, the law applicable to such contracts will become increasingly confused and uncertain. The standard Disputes clause, which appears in virtualy all Government contracts and which is the foundation of the system for administrative resolution of Government contract disputes, will be undermined. For this reason alone, petitioner urges that review of this case by this Court is required in the public interest.

III. The Court of Claims Erred in Holding that the Government May Issue Reprocurement Orders Under an Indefinite Quantity Contract for the Sole Benefit and Account of a Defaulted Government Contractor.

Petitioner contended before the Court of Claims that the Government's issuance of reprocurement orders under petitioner's contract for the sole benefit and account of a defaulted Government contractor was in

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[11] Defendant's Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment, pp. 7-8; Defendant's Memorandum In Response to Plaintiff's Supplemental Statement, p. 2.

violation of the applicable provisions of the Armed Services Procurement Regulation, § 8-602.6(a), and contrary to the previous interpretations and agreements of the parties. The court held that it was unnecessary to even consider whether the Government violated the applicable regulations, since the orders placed by the Government under petitioner's contract for Bogue's account were "subject neither to reprocurement nor new-contract guidelines." (Appendix A, page 22a) This ruling by the Court of Claims is erroneous as a matter of fact and law. Additionally, it places in substantial doubt the integrity of all Government indefinite quantity contracts and ignores the guidelines set forth by this Court with respect to the standards applicable to the construction of Government contracts.

Contrary to the decision of the Court of Claims, the actual facts are that the orders in question were reprocurement orders and so stated on their face. Orders 4 and 6 stated as follows:

> Note 1: This is a reprocurement of supplies which were terminated for default under Contract AF 04(606)-12917 [the Bogue contract].[12]

Moreover, the applicable law prohibited the placement of such orders under petitioner's contract. ASPR § 8-602.6(a) requires that contracting officers award reprocurement contracts at "as reasonable a price as practicable." Petitioner argued to the Board that *a fortiori* the prices set forth in the subject contract were not "as reasonable as practicable" within the meaning of ASPR, since the prices were based on errors and

[12] Orders 4 and 6 appeared in the administrative record as Tabs C and F in the Rule 4 file (ASBCA No. 11918, Vol. 2).

mistakes in petitioner's bid, and since the Government stipulated before the ASBCA that *higher* prices than those set forth in petitioner's contract were "fair and reasonable." However, as shown above, the Board held that "as reasonable a price as practicable" means "the *lowest* practicable price." [68-1 BCA at 31,598; Appendix C, page 36a (Emphasis added)]. Petitioner urges that the Board's interpretation of ASPR was erroneous as a matter of law, and that the result reached by the Court of Claims is patently unfair.

The deficiencies of the result reached by the Court of Claims are concisely stated in the separate opinion of Judge Davis:

> *To sanction what was done here is to permit the defendant to elect to bail out Bogue at the expense of FEC—which had, of course, nothing to do with Bogue's transgression.* The defendant was not obligated to Bogue to use FEC as the reprocurement vehicle. The ASPR regulation, 32 C.F.R. § 8.602-6(a) (1965), calling for reprocurement at "as reasonable a price as practical," does not direct that the reprocurement order must be given to a low offeror who finds out he has bid too low because of a mistake. *Octagon Process, Inc.*, ASBCA No. 10371, 65-2 BCA ¶ 5168. Similarly, this standard of "as reasonable a price as practical" would not require reprocurement under plaintiff's contact which likewise had set the price too low because of mistake. On this basis that the Government was legally free to reprocure elsewhere, *I would hold it overreaching, and not within the parties' reasonable contemplation, to insist on reprocuring under the FEC contract although it was by then known to be a loss arrangement. Bogue, not the innocent plaintiff, should bear that portion of the loss.* [Emphasis added.]

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the decision of the Court of Claims.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 166-72

(Decided October 25, 1973)

FEDERAL ELECTRIC CORPORATION v. THE UNITED STATES

C. Stanley Dees for plaintiff, *Gilbert A. Cuneo*, attorney of record for plaintiff. *Harvey G. Sherzer, N. J. Villarosa* and *Frank X. Prevost*, of counsel.

Sheldon J. Wolfe, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

KUNZIG, *Judge*, delivered the opinion of the court:

Plaintiff Federal Electric Corporation (FEC) presents a five-count claim for relief in this case involving an indefinite quantity contract between FEC and the Government:

Count I requests a Wunderlich Act (41 U.S.C. §§ 321, 322 (1970)) review of an adverse decision by the Armed Services Board of Contract Appeals (the Board).[1]

Count II asserts the Government breached the contract by insisting plaintiff perform following plaintiff's purported revocation.

Count III asserts the Government breached the contract by improperly reprocuring under the contract for another supplier's account.

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[1] Federal Electric Corporation, 68-1 BCA ¶ 6834.

Count IV alleges a fifth amendment taking of property as a result of the Government's action described in count II.

Count V alleges a fifth amendment taking of property as a result of the Government's action described in count III.

Plaintiff moves for summary judgment on counts I through III, while the Government cross-moves for summary judgment on these three counts and moves for summary judgment on counts IV and V.

We hold that the Board's conclusion in favor of the Government withstands Wunderlich review (count I). We further hold that plaintiff's arguments gain no greater credence by casting the dispute in terms of a breach of an implied-in-fact contract (counts II and III). Thus, our legal conclusions in favor of the Government under Wunderlich review equally dispose of plaintiff's breach claims. Accordingly, the Government's motion for summary judgment on counts I, II and III should be granted, and the plaintiff's motion should be denied.

Having so concluded, it is unnecessary for the court to discuss plaintiff's fifth amendment argument (counts IV and V). Only if the contract had been held unenforceable or the reprocurement erroneous would plaintiff possibly have had an argument that its performance under such conditions constituted a taking without just compensation. Accordingly, the Government's motion for summary judgment on counts IV and V should be granted.

I

Background

FEC responded to an Air Force Request for Proposal (RFP) for the production and delivery of five types of mobile generator sets of varying sizes and capacities. The RFP called for an indefinite quantity contract with a minimum of 453 and a maximum of 3600 generators to be or-

dered within a 12-month period.[2] On December 17, 1965, the contract (AF 04(606)-15369) was approved by an authorized representative of the Secretary of the Air Force. Thereafter, on December 20, 1965, the Air Force mailed an official acceptance of plaintiff's proposal and at the same time issued the first delivery order for the minimum quantity. On January 11, 1966, the Air Force issued a second delivery order for an additional six generators.

Subsequent to receipt of the first two orders, plaintiff realized that it had made some substantial errors in its response to the RFP which were resulting in unanticipated losses. Plaintiff had anticipated a small loss on the contract, but not to the extent that became apparent once production began. After meeting with the appropriate Air Force officials, plaintiff notified the Government by letter dated March 29, 1966 that it considered the contract unenforceable with respect to all future unordered goods. The contractor further asserted that its offer to supply the Government up to 3600 generators constituted a revocable offer by plaintiff for those units not yet ordered by the Government. In accordance with this position the contractor advised the Government as follows:

> 1. Federal Electric Corporation hereby withdraws its offer to supply the unordered generators under Contract AF 04(606)-15369 at the prices quoted in the contract.
>
> 2. Notwithstanding the above, should the Government deem that the offer of Federal Electric Corpora-

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[2] Part XI of the contract reads:

"This contract shall be effective and binding as of the date of approval thereof by the Secretary or his duly authorized representative as set forth in General Provision 37. The Government reserves the right to issue orders against this contract for a period not to exceed 12 months from the date of approval. For the purposes of computing the aforementioned 12 month time period on this contract, the first day of the contract period shall be excluded and the last day of the contract shall be included."

tion, as contained in Contract AF 04(606)—15369, is irrevocable and, as a result thereof determines to place additional orders for generators, then Federal Electric Corporation will promptly proceed to manufacture the unit so ordered under protest and without prejudice to its rights.

3. Should, as a result of subsequent actions by FEC and/or the Government, it be determined that FEC's position is correct, as defined above, an equitable adjustment shall be made in accordance with the "Changes" and/or "Extras" clauses of the aforementioned contract.

4. Production under future orders for additional generators will not be deemed as a waiver of FEC's rights to recover the losses it experiences in supplying the generators because of mistakes made by FEC in bidding contract AF 04(606)-15369.

5. FEC further asserts that its actions herein are taken solely for the purpose of protecting FEC's legal rights and that nothing herein should be deemed in any manner whatsoever as a refusal to perform pending resolution of the dispute or disputes between the parties hereto or in any way serve as grounds for terminating the contractor's right to proceed.

Subsequent to FEC's letter of March 29, 1966, the Air Force issued the following orders:

Order number	Date	Quantity
3	March 30, 1966	292
4	April 15, 1966	662
5	May 10, 1966	8
6	June 13, 1966	101
7	June 14, 1966	199
8	August 17, 1966	43
9	November 7, 1966	443
10	December 9, 1966	426

Plaintiff objected to receipt of each of these and, with the exception of orders number 9 and 10, individual appeals were taken from adverse decisions of the contracting officer regarding plaintiff's obligation to deliver the items.[3] Additionally, plaintiff objected to orders four and six on the separate basis that they had been expressly made to cover generators ordered but never delivered under a different contract with the Bogue Electric Company (Bogue) and, therefore, intended to mitigate that defaulting contractor's damages. Throughout this period, plaintiff adhered to its position, as outlined in the March 29, 1966 letter, that it would continue to perform, but under protest.

Plaintiff's appeals from the decisions of the contracting officer were consolidated before the Board. The Board decided for the Government, concluding:

> (1) That the FEC contract came into effect on December 20, 1965, simultaneously with defendant's placing of the minimum order and, hence, was enforceable *ab initio*. Plaintiff was thus bound to supply all orders placed under the contract at the prices set forth therein.
>
> (2) The contracting officer was entitled to issue orders under the subject contract to accomplish the reprocurement for the account of Bogue.

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[3] The following stipulation was submitted by the parties to the Board:

* * * * *

"5. That appellant timely appealed from final decisions upholding the right of the Government to issue Orders 3 through 8 under the subject contract. Should the Board determine that appellant was not obligated to accept orders under the contract subsequent to its letter of 29 March 1966 (Tab S, Rule 4 Documents for ASBCA No. 11726, and Tab M for ASBCA No. 11918), a decision by the ASBCA will affect Orders 3 through 10. * * *"

We will deal with these two issues separately in the sections which follow.

II

Enforceability of the Indefinite Quantity Contract

In deciding for the Government with regard to the enforceability of the FEC contract, we depart from the Board's reasoning.

An indefinite quantity contract provides for the furnishing of an undetermined quantity of supplies or services during a specified period. The advantages to the Government of this type of contract are clearly set forth in the applicable Armed Services Procurement Regulations (ASPR):

> (i) Flexibility with respect to both quantities and delivery scheduling;
>
> (ii) Supplies or services need be ordered only after actual needs have materialized;
>
> (iii) The obligation of the Government is limited; and
>
> (iv) It permits stocks to be maintained at minimum levels and allows direct shipment to the user.

32 C.F.R. § 3.409(c)(2) (1965). In order to avoid an attack upon this type of contract for lack of mutuality of obligation (*i.e.*, one party to the contract being obligated to perform while the other is not[4]), the contract must obligate the Government to order a stated minimum quantity. 32 C.F.R. § 3.409-3(a) (1972). *See Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489, 493 (1923).

Although the instant contract did provide for a minimum order of 453 generators, the contractor contends that, since

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[4] SEE 1A A. CORBIN, CONTRACTS 152 (1950), 1 S. WILLISTON, CONTRACTS 105A (3d ed. 1957)).

the Government did not place the minimum order until three days after the effective date of the contract, the entire contract is unenforceable *ab initio* due to lack of mutuality of obligation.

The Government counters that the contract was enforceable because the minimum order was incorporated in or issued contemporaneously with the execution of the contract, and that plaintiff was entitled only to compensation provided for in the contract. In the alternative, the Government contends that, if the contract was unenforceable, plaintiff is barred from seeking additional relief because plaintiff performed and an unenforceable contract is enforceable to the extent that it is performed.

We deem it unnecessary to resolve the issue of enforceability *ab initio* since we accept the Government's alternative contention. The present case is governed by the Supreme Court decision of *Willard, Sutherland & Co.* v. *United States, supra,* where the Court held that an indefinite quantity government contract, unenforceable at its inception due to a lack of mutuality of obligation, became valid and would be enforced to the extent it was performed. *Id.* at 493-94.

This court applied the *Willard, Sutherland* rule to hold enforceable an indefinite quantity contract to the extent that orders had been placed by the Government under it, without determining whether or not the contract was valid *ab initio*. *Tennessee Soap Co.* v. *United States,* 130 Ct. Cl. 154, 158, 126 F. Supp. 439, 441 (1954). This precedent squarely governs the situation at hand. The required minimum order having been satisfied, FEC's entitlement to compensation for supplying 2633 generator units, including the 2174 supplied following plaintiff's purported revocation, is governed by the terms of the subject contract.

Nor is this result affected by the fact FEC continued to perform after March 29, 1966 under protest. The contractor in *Willard, Sutherland* clearly stated that it was "doing

this [*i.e.*, performing despite the unenforceability of the contract] under protest which can be straightened out later." The protest issue was also raised in *Early & Daniel Co.* v. *United States*, 271 U.S. 140 (1926), which involved an indefinite quantity contract to deliver hay. When a dispute arose over an alleged breach by the Government, the contractor stated:

> [W]e want it distinctly understood that we are doing this under protest and are going to put the matter up to proper authorities in Washington; and if they rule in our favor, [we] want settlement at fair market price for amount we overfill.

271 U.S. at 141. This language is strikingly similar to that used in FEC's letter of March 29, 1963. Nevertheless, the Supreme Court held in *Early & Daniel* that the contractor had the option of delivering or not delivering. Having chosen to deliver, even under protest, the *Willard, Sutherland* rule applied and the contractor was bound to the contract price to the extent that the contractor performed. *Id.* at 142.

In an attempt to avoid the effect of the *Willard, Sutherland* rule, plaintiff raises two arguments which we feel are without merit. First, plaintiff contends that "under the contract" the Government's actions constituted a "change" and that the disputes clause compelled continued performance under protest by plaintiff while pursuing an administrative adjustment. *See Dynamics Corp. of America* v. *United States*, 182 Ct. Cl. 62, 389 F.2d 424 (1968).

In *Dynamics Corp.* we held that plaintiff's performance under protest in order to comply with its contract's standard disputes clause distinguished its situation from the *Willard, Sutherland* and *Early & Daniel* precedents, in which disputes clauses were not present. No challenge was made, however, to the enforceability of the indefinite quantity contract in *Dynamics Corp.;* the dispute involved only

performance by the contractor subsequent to the termination of the admittedly valid agreement. In the present case, on the other hand, FEC seeks first to disavow the existence of the subject contract and then, by citing the *Dynamics Corp.* precedent, to take advantage of the disputes clause which is a part of that very agreement. We cannot abide this effort by the plaintiff to "come up under" the same contract it seeks to have nullified. Plaintiff "can't have it both ways."

Secondly, under its breach-of-contract theory, plaintiff contends that the *Willard, Sutherland* rule has been modified by recent cases which allow continued performance despite a pre-existing breach. *See, e.g., Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 455 F. 2d 546 (1972). Plaintiff's reliance on *Northern Helex* is misplaced. Although the court there allowed continued performance without prejudice after a breach had occurred, the court emphasized that it takes "particular circumstances" in "specific cases" to warrant such action. The special circumstances of *Northern Helex* (*i.e.,* the processing and storing of helium, a valuable national resource, as a by-product of another chemical process) clearly distinguishes that case from the instant one.

Though we might find persuasive the contemporary view of performance under protest as restated in section 1-207 of the Uniform Commercial Code [5] and accepted by the court under the special circumstances of the *Northern Helex* case, we hesitate to extend this view in the face of a clear, contrary rule established and affirmed, albeit a half century ago, by the Supreme Court. We are reminded in this connection of the Court's recent expression of "difficulty in comprehending how decisions by lower courts can ever

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[5] "A Party who with explicit reservation of rights performs or promises performance or assents to perform in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. * * *"

undermine the authority of a decision of [the Supreme] Court." *United States* v. *Mason*, 412 U.S. 391 (1973).

In summary, we hold that the subject contract was enforceable to the extent that it was actually performed.

III

The Bogue Reprocurement

Having concluded that the instant contract was enforceable to the extent that it was performed irrespective of the contractor's protests, it is necessary to discuss plaintiff's secondary contention—that the Air Force was not entitled to place orders under the contract for the account and benefit of a defaulted contractor. We find that the Board's decision for the Government was correct as a matter of law.

Prior to the execution of the instant contract, the Air Force was having difficulties with Bogue, another supplier of the same generators. A contract with Bogue was terminated for default on November 19, 1965, thus necessitating a reprocurement to satisfy the requirements of that agreement. Accordingly, the Government on January 31, 1966 issued a reprocurement RFP. FEC responded to this new RFP. The bid price was substantially higher than the one which resulted in the FEC December 1965 contract, yet was still the lowest bid submitted in response to the reprocurement RFP. Rather than issue a new contract, the Government on or about February 21, 1966 offered FEC additional consideration to permit the Government to reprocure the Bogue units under the original FEC contract. FEC rejected this proposal. The Government then decided to utilize the existing contract to satisfy its reprocurement needs. Accordingly, the Air Force issued the fourth and sixth delivery orders under the original contract on April 15, 1966 and June 13, 1966 for 763 units which had been

ordered but not delivered under the Bogue contract. Plaintiff delivered these units, as all others in question, under protest.

FEC contends that the Government was not entitled to reprocure the Bogue requirements under the instant contract, since it was clear that a substantial loss to FEC would result from said reprocurement. The grounds for this position are first that the Board erred in interpreting 32 C.F.R. § 8.602-6(a) (1965), requiring that the contracting officer reprocure at "as reasonable a price as practical," to mean the "lowest practical price." Secondly, plaintiff cites the "mistake in bid" cases for the proposition that its original contract was a mistake and thus could not be utilized as the basis for the reprocurement. *See Royal Pioneer Paper Box Mfg. Co.*, 69-1 BCA ¶ 7631; *Octagon Process, Inc.*, 65-2 BCA ¶ 5168.

We deem it unnecessary to reach these difficult questions in this case because we hold that, as far as FEC was concerned, orders four and six were subject neither to reprocurement nor new-contract guidelines because they were merely additional orders under a pre-existing contract.

Admittedly, it appears harsh to place the financial burden of Bogue's default upon plaintiff. Nevertheless, by the terms of the FEC contract the Government was free to order up to 3600 generators within one year, regardless of the reason why said generators were needed. As long as orders four and six did not result in the quantity limitations of the original contract being exceeded and were consistent in all other respects with the specifications of the contract, there was nothing to prohibit the Government from placing the orders under the original contract. The fact that these were reprocurement orders is relevant only to the Government's duty to mitigate damages to the defaulted contractor. In an effort to accomplish this goal,

the contracting officer is not limited to specific methods of reprocurement, but rather is given broad discretion. *Astro-Space Laboratories, Inc.* v. *United States*, 200 Ct. Cl. 282, 308, 470 F. 2d 1003, 1017 (1972).

Plaintiff finally contends that the parties' negotiation for reprocurement under the FEC contract (but at a higher consideration) represented a contemporaneous interpretation by the parties that defendant was not entitled to accomplish the Bogue reprocurement under the subject contract according to its original terms, an interpretation that should be given great weight by the court. *See, e.g., Dynamics Corp. of America* v. *United States, supra* 182 Ct. Cl. at 73, 389 F. 2d at 430. We reject this assertion because of its speculative nature. The fact that defendant initially considered increasing plaintiff's compensation does not necessarily mean defendant felt it could not procure under the original terms of the FEC contract, especially since defendant ultimately did exactly that. Hence, we do not feel the alleged contemporaneous interpretation merits sufficient weight to rebut our decision that the procurement of 763 generators under the FEC contract was proper.

In light of the foregoing, we conclude that the Board's decision withstands Wunderlich review, though we reject some of the Board's reasoning in reaching this result. Because the subject contract is found enforceable to the extent performed and the Bogue reprocurement was proper, plaintiff's breach-of-contract arguments are without merit. For the same reasons, we find it unnecessary to reach plaintiff's fifth amendment allegations.

Accordingly, plaintiff's motion for summary judgment on counts I, II and III is denied; defendant's cross motion for summary judgment on counts I, II and III and its motion for summary judgment on counts IV and V are granted; and the petition is dismissed.

NICHOLS, *Judge*, concurring:

I join in the judgment of the court, but I would not reject the reasoning of the Board, 68-1 BCA § 6834, or any substantial part thereof. Its handling of the contentions also made here I find simple, sound, and convincing. One beauty (among many) of the Board's opinion is that it avoids the Scylla and Charybdis between which this court, on its chosen course, must pass: that is, either we must ignore what we call "the contemporary view of performance under protest" or we must presumptuously overrule some elderly Supreme Court decisions. Since we can't "undermine" their authority, I hope it is true we can't add to it either.

DAVIS, *Judge*, dissenting in part:

I join Parts I and II of the court's opinion, but on the Bogue reprocurement (Part III) I differ. In my view the parties did not contemplate, when they made this contract, that the Government would be able to use the agreement as a vehicle for reprocuring items under someone else's defaulted contract, where FEC would suffer a loss through such an order (and therefore objected to it). It seems to me most unlikely that, if the question had been raised during the negotiations, FEC would have agreed that it was obligated to fill the order. To do justice, I would construe the contract, despite its all-embracing language, as not covering this particular situation.

To sanction what was done here is to permit the defendant to elect to bail out Bogue at the expense of FEC—which had, of course, nothing to do with Bogue's transgression. The defendant was not obligated to Bogue to use FEC as the reprocurement vehicle. The ASPR regulation, 32 C.F.R. § 8.602-6(a) (1965), calling for reprocurement at "as reasonable a price as practical," does not direct that the reprocurement order must be given to a low offeror who finds out he has bid too low because of a mistake. *Octagon*

Process, Inc., ASBCA No. 10371, 65-2 BCA ¶ 5168. Similarly, this standard of "as reasonable a price as practical" would not require reprocurement under plaintiff's contract which likewise had set the price too low because of mistake. On this basis that the Government was legally free to reprocure elsewhere, I would hold it overreaching, and not within the parties' reasonable contemplation, to insist on reprocuring under the FEC contract although it was by then known to be a loss arrangement. Bogue, not the innocent plaintiff, should bear that portion of the loss.

The rationale of *Willard, Sutherland & Co., supra*, does not, in my view, control this aspect of the case because the two Bogue reprocurement orders were an authorized constructive change in the original coverage of the contract, entitling plaintiff to an equitable adjustment. With respect to a changes claim "under the contract," the contractor is required to continue performance, and by doing so does not forfeit his claim for additional payment. There is no problem of invalidity on this portion of the case. The defendant affirmatively asserts the full validity of the contract, and the plaintiff assumes it, and must assume it, for this facet of its claim.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

166-72 FEDERAL ELECTRIC CORPORATION

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*, except that DURFEE, *Senior Judge*, participated only in No. 250-67 in which KASHIWA, *Judge*, took no part.

Order

These cases come before the court on motions for rehearing, to alter judgment, for reconsideration, for oral argument and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 23rd day of January, 1974, that said motions be and the same are denied as follows:

* * * * * * * * * *

166-72 Federal Electric Corporation. Plaintiff's motion for rehearing pursuant to Rule 151.

BY THE COURT
Wilson Cowen
Chief Judge

APPENDIX C

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA Nos. 11726, 11918 and 12161

Appeals of

Federal Electric Corporation

Under Contract No. AF 04(606)-15369

APPEARANCES FOR THE GOVERNMENT: Colonel David C. Yeoman, USAF—Chief Trial Attorney; Leonard F. Roberts, Esq.—Trial Attorney

APPEARANCES FOR THE APPELLANT: Sellers, Conner & Cuneo by: Gilbert A. Cuneo, Esq.; C. Stanley Dees, Esq.; Frank X. Prevost, Esq.

Opinion by Mr. Sobernheim

This is an appeal from the contracting officer's denial of appellant's claim for an equitable adjustment in the contract price of generators which appellant delivered to respondent in response to delivery orders (sometimes referred to herein as "D. O.") issued under Contract No. AF 04(606)-15369. Appellant has claimed that the delivery orders were contract changes or extras unilaterally imposed on appellant by the contracting officer while the latter took the view that compliance with these orders was the essence of appellant's contractual obligation.

Subsidiarily, appellant has also argued that two of the delivery orders, issued to procure generators which a defaulted contractor under another contract had failed to deliver, were invalid. It is urged that delivery orders under the instant contract could not legally be used to reprocure such supplies from appellant, when respondent knew that compliance with the two orders would cause appellant heavy losses due to the excessively low price mistakenly quoted by appellant to the Government under the contract.

Both of these issues are now before the Board for resolution. The parties have agreed that, should appellant prevail, the matter will be sent back to the contracting officer for ascertainment of the amount due appellant.

STATEMENT OF FACTS

1. *The Contract*

Contract No. AF 04(606)-15369 was entered into by the parties as of 20 December 1965 as a result of competitive negotiations. The Request for Proposals (RFP) leading up to the execution of the contract called for quotations on the delivery to the Government of five (5) sizes of generator sets from 15 to 150 kw, but allowed quoters to limit their proposals to one or more categories (ASBCA No. 11718, R4 doc. A, Sched. p. 15). Appellant did not avail itself of this permissible limitation on its proposal and quoted prices for all five sizes.

In addition, after the proposals were opened, appellant's parent, International Telephone and Telegraph Corporation, at the request of the procuring activity, agreed to furnish the financial requirements of appellant in connection with the prospective contract performance in an amount not to exceed twenty (20) million dollars (*id.*, R4 doc. U). This request was perhaps caused by the fact that appellant's unit prices, as disclosed by its pricing breakdowns (Form DD 633), indicated either a small loss or minimal profit.

Appellant explained to the Government negotiators that it was willing to accept this loss, because it desired to obtain the contract in order to provide work for its new plant at Richland, Washington, but that it expected to recoup this loss by future production economies and efficiency either under this or other contracts (ASBCA No. 11918, R4 doc. K).

Thereafter appellant became the contractor under Contract No. AF 04(606)-15396.

The contract contained price and delivery schedules for furnishing to the Government, on orders to be given thereafter, various quantities of five sizes of generators (15, 30, 60, 100 and 150 kw) with a minimum of 453 and maximum of 3,600 units. The price for the minimum order, including packaging and a nominal charge for data, was $2,893,884.00. and the price for all 3,600 units was $23,114,753.00, excluding spares which were to be provisioned and priced separately. The minimum constituted about 12.5% of the maximum.

The unit prices for the generators were established on a sliding scale, the highest price being established for the quantity in each category designated as the minimum and decreasing for each quantity up to the hundred nearest the minimum and for each additional 50 units up to the maximum. In figuring the applicable bracket, the quantities of each size of generator furnished by appellant were to be cumulated.*) The primary item for which unit prices were established was skid-mounted generators. Prices for wheel-mounted generator sets were established on similar sliding scales as an add-on to the basic price. Prices for packaging were, however, flat unit prices, depending on the packaging

*) As an example, the price schedule for 150 kw generator sets read as follows:

		Unit Price
"Minimum Quantity	59	$8,823
Subsequent Order Quantities	60-100	8,716
	101-150	8,608
	151-200	8,500
	201-250	8,438
	251-300	8,376
	301-350	8,314
	351-400	8,251"

The cumulative pricing provision appears on page 16 of the contract schedule (ASBCA No. 11726, R4 doc. A). Under it, if appellant furnished 100 generators of 150 kw capacity, 59 would be priced at $8,823 per unit and 41 at $8,716. A further 100 generators of this size would be priced 50 at $8,608 each and 50 at $8,500 each.

and preservation level and the size and weight of the generator sets.

The obligation to furnish particular quantities of generators was to be triggered by delivery orders authorized to be issued for the period of one year from date of approval of the contract (ASBCA No. 11726, R4 doc. A, Contr. Sched. 1 Part XI, p. 21). As to these delivery orders the contract provided in Part X of the contract schedule (*ibid.*) as follows:

> "PART X ORDERS: (JAN 1963)
>
> (a) The Contractor agrees to furnish to the Government, when ordered, the supplies or services set forth in the Schedule up to and including the quantity designated in the Schedule as the 'maximum quantity.' The Government agrees to order the quantity of such supplies and services designated in the Schedule as the 'minimum quantity.' Such supplies or services will be furnished at the prices set forth in the Schedule.
>
> (b) Delivery Orders for supplies or services shall be issued by the Contracting Officer in writing, dated, and numbered. They shall set forth (i) the supplies or services being ordered, (ii) the quantities to be furnished, (iii) delivery or performance dates, (iv) place of delivery or performance, and (v) packing and shipping instructions, if any. Amendments to delivery orders may be issued by the Contracting Officer by written change order. Each delivery order or change order which increases the dollar amount, shall contain a citation of funds from which payment for the supplies or services ordered shall be made."

The contract further included General Provisions for fixed-price supply contracts with standard changes, extras, default, convenience termination and disputes clauses.

2. *Appellant's Performance*

(a) ASBCA No. 11726

Simultaneously with the contract, the contracting officer mailed appellant D.O. No. (04-606)66-33747 *) for the minimum quantity of each category of generator sets, totalling 453 units for an amount of $2,907,649. Appellant raised no question as to this order, furnished the generator sets to respondent and was apparently paid therefor at the prices listed in the contract schedule. On 11 January 1966 the contracting officer issued D.O. No. 34018 for 6 generator sets and again appellant performed the order in accordance with its terms and presumably was paid the contract price.

Soon after receipt of D.O. No. 34018 appellant apparently became aware of the fact that its manufacturing costs outran its prices. A meeting was held on 17 and 18 February 1966 at the offices of the Sacramento Air Materiel Area (SAMA), the procuring actvity, when the appellant explained its situation. But what transpired in detail was not spread on the record. On the day after the meeting appellant wrote to SAMA in relevant part as follows:

> "Current reviews of our proposal for this procurement have revealed several significant mistakes in our preparation of costs which are much greater than the potential risk originally contemplated.* * *
>
> Our identification of the following specific errors is recorded for your information and such assistance as you may be able to furnish to overcome the financial impact of these errors:
>
> 1. We estimated and included costs for only one item where two were required for
>
> a. Side shutters
> b. Batteries
> c. Contactors (150 kw units only),

*) D.O's are hereafter referred to individually only by the last five or four digits of their serial number.

2. Freight costs for materials and components were not included in the estimate,

3. An error was made in estimating costs of the over/under voltage monitor,

4. Costs of the chassis and housings were underestimated,

5. We assumed that a 5% reduction in vendor prices could be obtained whereas, in fact, this has not been possible because of Government directed source vendors,

6. While a Plant Manager, a Quality Assurance Supervisor, and 6 Inspectors where shown on the manning chart, in our proposal, they are not included in our cost calculations.

"The representatives of the Sacramento Air Materiel Area have very considerately agreed to assist us in attempting to alleviate the cost impact under Items 3. and 5. above. * * * We are most appreciative of your efforts to help us in the areas outlined above and wish to assure you that we are making an all-out effort to meet our commitments."

Discussions apparently continued between the parties, although fruitlessly.

On 23 March 1966 the contracting officer issued D.O. No. 35784 calling for delivery of 292 generator sets of various sizes for a total price of close to $2,000,000. This order was assertedly received by appellant on 30 March 1966. However, on 29 March 1966, appellant had already set forth its position as to its rights under the contract. (ASBCA No. 11726, R4 doc. 8). It asserted that as to unordered goods the contract was unenforceable, that its promise to furnish up to 3,600 generator sets was a revocable offer and that it was withdrawing its offer to furnish generator sets at the quoted

prices. Nevertheless, it offered simultaneously to furnish generators ordered by the Government under the contract, and under protest if the Government should deem appellant's offer irrevocable. It stated that, if the Government's position was found erroneous, it would seek a price adjustment under the changes or extras clauses of the contract and that its fulfillment of future orders for generators should not be deemed a waiver of its right to recover the losses caused by its mistake in bid. It concluded with a statement that its letter should not be taken as a refusal to perform or as a basis for the termination of the contract.

After receipt of D.O. No. 35784 appellant on 8 April 1966 reiterated its position and requested a final contracting officer's decision on the right of the Government to issue additional orders in view of appellant's withdrawal of its allegedly revocable offer. Appellant further advised the contracting officer that in accordance with its letter of 29 March 1966 it would proceed with filling the order (ASBCA No. 11726, R4 doc. T). Appellant's position was rejected by the contracting officer's final decision of 31 May 1966 (*id.*, R4 doc. U) and appeal ASBCA No. 11726 followed.

(b) ASBCA No. 11918

Thereafter the contracting officer issued D.O.'s as follows:

No. 35775 on 15 April 1966 for 662 units
No. 36567 on 10 May 1966 for 8 units
No. 41205 on 13 June 1966 for 101 units
No. 41206 on 14 June 1966 for 199 units

By letters dated 14 June 1966 (ASBCA No. 11918, R4 doc. N), 1 August 1966 (*id.*, R4 doc. Q), and 3 August 1966 (*id.*, R4 doc. R) appellant protested the issuance of these four D.O.'s and requested a final decision of the contracting officer on the Government's right to proceed. On 19 September 1966 the contracting officer affirmed the Government's right to proceed as it had done and Appeal ASBCA No. 11918

followed. This appeal also raises the reprocurement issue, the facts of which are presented below.

(c) ASBCA No. 12161

On 17 August 1966 the contracting officer issued D.O. No. 41675 for 43 units, on 7 November 1966 D.O. No. 0061 for 443 units and on 9 December 1966 D.O. No. 0062 for 426 units, all within the one-year period of the contract, bringing the total quantity of generators ordered under appellant's contract to 2,633 units.

Appellant protested the issuance of D.O. No. 41675 on 20 October 1966 and on 22 November 1966 the contracting officer issued a final decision rejecting appellant's position as to the unenforceability of the contract (ASBCA No. 12161, R4 does. U, V). No separate protest appears to have been filed or final decision rendered as to the validity of the final two D.O.'s but it has been stipulated by the parties under date of 15 May 1967 that the Board's decision in the instant appeals shall be applicable to the validity of these two orders.

Appellant also protested against the issuance of the last two D.O.'s to the Comptroller General on grounds not argued or relevant here. This protest was rejected by him in his decision No. B-160560, dated 15 September 1967.

3. *The Bogue Reprocurement*

Prior to the time of the instant procurement respondent acting through SAMA had entered into Contract No. AF 04(606)-12917 with Bogue Electric Company for similar generators. This contract was terminated for Bogue's unexcused default on 19 November 1965 somewhat over one month prior to the execution of appellant's contract. On 31 January 1966 respondent acting through SAMA issued RFP No. 66-08334 to reprocure a minimum of 657 and a maximum of 816 units, the exact quantities to be stated in the contract to be entered into. The RFP provided further that the pro-

spective contractor would receive Government-furnished components valued at $1,178,773.74 which it was to repair and utilize in the manufacture of the generators. However, quoted unit prices were not to take into account the GFP, which was Bogue's parts inventory. Instead the price of each generator set was to be reduced, whenever a GFP component was incorporated therein, by the value of such GFP component stated in the RFP.

Four proposals were received by SAMA, appellant's being the lowest, though substantially higher than the prices embodied in Contract No. AF 04(606)-15369. Negotiations ensued but at an early date swerved from the straight path foreshadowed by the IFB. For on or about 21 February 1966 the Government representatives prepared a memorandum pursuant to which the units sought to be procured under the RFP of 31 January 1966 were to be procured under appellant's contract (ASBCA No. 11726, Stip. par. 4; ASBCA No. 11918, R4 doc. V). This memorandum was not accepted by appellant and negotiations continued into March 1966 when a preliminary agreement was reached on prices and other terms "subject to availability of funds and approval by higher authority" (ASBCA No. 11918, R4 doc. J; ASBCA No. 11726, Stip. pars. 2, 3). These prices were comparable to those which appellant had quoted in its response to RFP No. 66-08334 and from about $1,000 to $2,700 higher than the prices established by appellant's contract, depending on the size of the generators.

However, no contract was ever entered into on the basis of RFP No. 66-08334 and the negotiations conducted by the parties thereunder. For the Government reverted to its idea of February 1966 that these units should be reprocured under appellant's contract notwithstanding the strong objections voiced by appellant against this course of action (ASBCA No. 11918, R4 doc. L (letter dated 18 March 1966)). Accordingly, D.O. Nos. 35775 and 41205, previously referred to, were issued to effect the reprocurement of 763

units defaulted under the Bogue contract and were so earmarked by the contracting officer. Simultaneously with the issuance of D.O. No. 35775 the parties executed Supplemental Agreement No. 1 thereto (ASBCA No. 11726, R4 doc. M) under which appellant agreed to accept the Bogue inventory and to reduce its unit prices for the generators ordered under D.O. No. 35775, as contemplated by RFP No. 66-08334. In accepting this agreement appellant reserved its objections to the issuance of the D.O. except that it withdrew its argument (ASBCA No. 11918, R4 doc. L) that the contract of the parties did not contemplate an order such as D.O. No. 35775 "utilizing Government furnished property equivalent to one-third of the unit price" (ASBCA No. 11726, R4 doc. M). The second D.O. effecting a reprocurement under the Bogue contract was accepted without a similar written note such as Rule 4 document M just referred to.

DECISION

The validity of a contract to manufacture and deliver a fixed quantity of goods against payment of the purchase price is well settled. But difficulties arise when, as here, the quantity of goods to be furnished by the seller to the buyer is not fixed beyond the "minimum quantity".

I

At the one end of the spectrum are contracts where the quantity to be sold is defined in terms of a narrow range and where the courts have spelled out an obligation of the seller to furnish the minimum quantity. *Feuchtwanger* v. *Manitowoc Malting Co.*, 187 F. 713 (7th Cir. 1911). Similarly, the courts have held that reference to the actual requirements or needs of the buyer over a fixed period of time sufficiently defines the quantity to be furnished by the seller to the buyer so as to create a binding agreement. *United States* v. *Purcell Envelope Co.*, 249 U.S. 313 (1919); *Shader Contractors, Inc., et al.* v. *United States*, 149 Ct. Cl. 535 (1960); *Neil A. Goldwassert d/b/a Century Offset Co.*,

ASBCA No. 7027, 61-2 BCA par. 3124;* *Bronze Marker Corp.*, ASBCA Nos. 5650, 6201, 60-2 BCA par. 2811; *Lowell O. West Lumber Sales Co.*, ASBCA No. 2560 (1955).

At the other end of the spectrum are those agreements in which the seller does not become obligated to furnish any quantity of goods because the buyer is deemed not to have obligated itself to purchase any specific quantity of goods or, in some instances, services. *Cold Blast Transportation Co.* v. *Kansas City Bolt & Nut Co.*, 114 F. 77 (8th Cir. 1902); *Meredith* v. *John Deere Plow Co. of Moline*, 89 F. Supp. 787 (S.D. Iowa, 1950), aff'd 185 F.2d 481 (8th Cir., 1951); *E. I. DuPont de Nemours & Co.* v. *Claiborne-Reno Co.*, 64 F.2d 224 (8th Cir., 1933). This rule has been applied equally to Government contracts. *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489 (1923); *Atwater & Co.* v. *United States*, 262 U.S. 495 (1923); *Updike, Trustee* v. *United States*, 69 Ct. Cl. 394 (1930); *Sanz School of Languages*, ASBCA Nos. 9571, 9572, 1964 BCA par. 4257. In all of these cases the obligation of the buyer to purchase any quantity of goods or services from the seller was deemed unascertainable either by reference to a minimum quantity (see *Feuchtwanger, supra*) or to the buyer's requirements (see *U.S.* v. *Purcell Envelope Co., supra*). Since the purchaser need only buy what he may wish or want, the seller did not become obligated to furnish anything. But once he had accepted the buyer's order, he became obligated to furnish at the contract price the specific quantity of goods which by his acceptance of the order he had agreed to deliver. *Willard, Sutherland & Co.* v. *United States* and *Atwater & Co.* v. *United States, supra.*

In between these two poles is the range of contracts in which the total quantity of goods to be furnished by the seller is left indefinite but where the buyer undertakes an obligation to purchase at the minimum a fixed quantity of goods. Where this minimum quantity is purely nominal, the legal obligation of the seller to deliver goods at the contract

* For the sequel see 160 Ct. Cl. 450 (1963).

price is no greater than if such nominal obligation to purchase goods were omitted from the contract terms. *The Tennessee Soap Company* v. *United States*, 130 Ct. Cl. 154, 158 (1954); see *Neil A. Goldwasser, supra.*

Thus *Tennessee Soap* involved a contract for the purchase by the Navy of 120,000 pounds, more or less, of soap at about 8 cents per pound, for the purpose of replenishing the supply of vessels docking in United States ports. The minimum purchase to which the Navy had obligated itself was $10 worth of soap, or about 125 pounds. The plaintiff argued that it was not bound, because of the $10 minimum order, to deliver such indefinite amounts from time to time as the defendant might see fit to order and the court implicitly accepted this argument.

In *Goldwasser* this Board held that under a contract for the printing of a monthly newspaper the bargain was for the printing of the paper, as long as required, and not for a $100 minimum payment upon which the Government would be discharged of all further obligations to the contractor under its contract.

In both of the cited cases it was clear to the Court of Claims and to this Board that the minimum order was without business justification or value—a sort of lagniappe to give the appearance of consideration.

The instant appeal differs sharply on the facts from these instances. For the minimum quantity, the purchase of which was "not optional" with but obligatory upon respondent (see *International Fermont, Inc.*, ASBCA No. 9097, 1964 BCA par. 4290) constituted a substantial order in itself which any manufacturer of generator sets might well desire to fill, even if standing alone.*) Respondent's minimum pur-

*) Appellant argues also that to be valid consideration for any promise of appellant, the contract itself must embody the order. However, the regulations cited by appellant by implication leave the choice of the form of the minimum quantity order, whether in the contract or by separate instrument, to the contracting officer. *International Fermont, supra*, upholds the latter form as sufficient.

chase involved a substantial quantity of generators in each of the five sizes from 15 to 150 kw, and overall totalled between 12 and 13 percent in both quantity and value. Hence, we must determine to what extent the fact that respondent's minimum order under the contract was a substantial purchase of goods, involving an initial contract price of $2,893,-884.00, affects the applicability of the rule laid down in the *Tennessee Soap* decision. Neither party has cited decisions in which a contract for the delivery of supplies up to a maximum quantity, when ordered within a limited period of time, was held unenforceable as to goods as yet unordered, where, as here, a substantial minimum order for such goods was required and given by the Government. In *International Fermont, Inc., supra,* and *Continental Electronics Corporation,* ASBCA Nos. 8677, 8789, 1964 BCA par. 4287, cited by respondent, the issue before us here was apparently not raised and was not discussed by the Board. On the other hand, *Tennessee Soap Company* and *Sanz,* relied on by appellant, are *prima facie* distinguishable on their facts, since neither involves a substantial minimum order.

II

The basis on which indefinite quantity contracts not involving a substantial minimum order have been held unenforceable as to the delivery of goods not yet ordered has been lack of mutuality of obligation. The buyer was not required to order, hence the seller was not required to deliver. *Willard, Sutherland & Co.* v. *United States, supra.* Mutuality of obligation is required for the formation of a binding contract but the mutual obligations need not be equal as long as they provide consideration which the law deems sufficient. 1 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (3d ed. by W. H. E. JAEGER, 1957) sec. 105A, 101.

It is somewhat difficult to perceive why respondent's obligation to order 453 generator sets from appellant for a purchase price of almost $2,900,000 is not sufficient consideration in law and hence an obligation and promise provid-

ing consideration for appellant's counter-obligation or promise to deliver not only the 453 generator sets but additional units up to 3600 at the agreed upon prices. Inadequacy of consideration is generally not a proper subject of legal inquiry. But to the extent that total inadequacy of consideration sometimes is considered the equivalent of lack of mutuality of obligation (WILLISTON, *op. cit., supra,* at pp. 424-425), such inadequacy of consideration does not exist here. Moreover, a promise such as that made by respondent is sufficient as a matter of law to provide consideration not only for its exact counterpart, but also for additional "options" such as appellant here made to respondent. *Ibid.* Supported by consideration furnished by respondent such "options" are binding on appellant and cannot be withdrawn without cause.

The view as to mutuality of consideration adopted here has also been recently expressed by the Comptroller General (B-160063, dated 10 February 1967). After discussing the distinction between requirements contracts and those in which performance is "totally dependent upon the wish, will or want of one of the parties", he added:

> "We suggest, therefore, in the future that language be used in estimated quantity type contracts which is sufficient to obligate the Government so that contracts will not be open to the allegation that they are unenforceable for lack of mutuality. This can be done simply enough with the insertion of a phrase to the effect that whatever quantities of the product in question which the using activity may need it will purchase from the contractor; or, if the using activity prefers, it may promise to purchase at least a stated minimum number of units from the contractor."

The instant contract effectively meets the test of this suggestion. The contract, in the absence of overriding considerations to the contrary, must, therefore, be held binding on appellant.

III

From what has been said above it follows that the rule of *Tennessee Soap Company* and similar decisions has no application here, unless the contract between the parties, in the light of all surrounding circumstances, must be read as expressing a different intent. We thus reach appellant's contention that it was not the intent of the parties that the minimum quantity order should create mutuality of obligation between them as to the entire contract.

Appellant argues that it clearly intended to accept a firm obligation only as to the minimum quantity order, and that as to all further quantities it merely reserved to itself the option, revocable at any time, to accept such orders for larger quantities up to 3600 units as respondent might thereafter issue. In support of its argument appellant cites the fact that it consistently took this position—beginning with its revocation letter of 29 March 1966. But this letter was written after the dispute between the parties arose, is self-serving, and cannot bolster appellant's position except to show that its position after the dispute arose was consistent.*)

But to determine the parties' intent we must go back further. There is nothing shown of the original negotiations of the parties which would indicate that appellant construed the contract terms solely as a kind of framework for orders which it might accept or decline to fill at will. On the contrary, the record discloses expressions of appellant's intent which, while not perhaps wholly conclusive, tend to contradict its later stand.

Appellant was obviously anxious to obtain the contract and hence willing to assume the risk of a small loss, about

---

*) As to the potential effect of inconsistent *post litem motam* positions on a contractor's claim see *Willard, Sutherland & Co.* v. *United States*, both *supra*. Under these decisions appellant is bound to the contract prices for the minimum quantity order D. O. No. 33747 and the first additional order D. O. No. 34018.

1% of the maximum contract price. It was also willing to quote decreasing unit prices for increments above the minimum quantity order, an inducement to the Government to place larger orders which would make little sense if appellant had not been willing to present itself to the Government as a firm source of supply.

When requested by SAMA to explain its apparent loss quotation, appellant on 18 November 1965 explained its proposal as a way of implementing a contract with the AEC, about to be executed at that time. Under that contract, it was to assist in the industrialization of the tri-cities area in the State of Washington and had "committed" itself to a "substantial employment and capital investment over a five-year period" (ASBCA No. 11918, R4 doc. K). It further advised SAMA that it had arranged for a term lease for plant facilities inspected by SAMA representatives the previous day pending construction of its own plant. Moreover, on 19 November 1965 I.T.T., at appellant's request, guaranteed the latter's ability to perform to an amount not to exceed $20,000,000. Appellant has placed much emphasis on the use of the words "not to exceed" as indicating that appellant did not intend to bind itself to fill $20,000,000 worth of orders in excess of the minimum quantity. But the language of the guaranty shows at most that there was leeway between appellant and ITT as to the actual amount which ITT might be called upon to advance to appellant. Hence we must, nevertheless, find that appellant's letter of 18 November 1965 and its parent's guaranty were far more compatible with a firm undertaking to fulfill respondent's orders for generator sets up to the maximum quantity in consideration of the Government's initial order, than with any pre-existing intent to reject orders above the minimum as not binding.

What apparently led appellant to this position was, indeed, not a preconceived plan at the time of contract negotiation, but the discovery of numerous improvident errors in pricing which resulted in price quotations that would re-

sult in assertedly substantial losses. Even when this error was first discovered, appellant did not assert that it was not bound to fill orders above the minimum, but treated the matter as a "problem area" which it hoped "to alleviate" in subsequent calls beyond the 453 unit minimum order. Appellant, in its letter of 19 February 1966 (ASBCA No. 11918, R4 doc. W)—the earliest expression of its position after execution of the contract which the record contains—after the expressions quoted above, concluded:

> "We are pursuing a course of action of seeking every possible means of meeting our delivery commitments without suffering serious losses. We are most appreciative of your efforts to help us in the areas outlined above and wish to assure you that we are making an all-out effort to meet our commitments."

These words are not expressing the position of the grantor of a revocable option to sell, but those of a seller who has obligated himself irrevocably to sell goods to a purchaser, when ordered, and who now finds that due to an inadequate price quotation, he has to take an unwelcome loss. The record leaves no doubt that appellant's alleged consistent position that it was not bound by its contract to furnish generator sets above the minimum quantity, was determined upon only some time after 19 February 1966 when appellant must have found out that such assistance as SAMA was able to give it would not sufficiently cut its losses. In the light of the evidence which we have examined, we are compelled to find that appellant did not intend to enter into Contract No. AF 04(606)-15369 as a revocable option contract and did not express such intent during the contract negotiations in such a manner that respondent should have become aware thereof. It also did not thereafter and prior to 29 March 1966 in its conduct reflect such position. Hence, since there is in the Board's view mutuality of obligation, appellant was bound to furnish such generator sets as respondent did in fact order, up to the maximum of 3600 units.

Appellant, in aid of its main arguments, has pressed certain other points which are equally unpersuasive. Clearly, in the light of the conclusion reached hereinabove, one cannot find in the terms of PART X of the contract schedule the kind of ambiguity to which the rule called "*Contra Proferentem*" can apply. The language of PART X is unambiguous and can acquire the meaning now attributed to it by appellant only as a matter of law—a view already rejected herein—or by the proof of a specific intent of the parties as described by appellant. But contrary to appellant's argument, to apply the rule of interpretation against the drafter in the manner advanced here by appellant would be to frustrate what clearly appears to have been the intent of the parties. Yet, even if there were an ambiguity, the rule should not be mechanically applied to frustrate such intent. Shedd, *Resolving Ambiguities in Interpretation of Government Contracts,* 36 GEO. WASH. LAW REV. 1, 7-8, 21 (1967). Here quite clearly there is no place for the application of this rule.

Appellant has further argued that the presence of a convenience termination clause relieves respondent of all effectively binding obligation to order even the minimum quantity. That argument has heretofore been raised against the binding nature of requirements contracts and has been rejected conclusively both by this Board and the Court of Claims. *Gulf Coast Aviation Co., Inc.,* ASBCA Nos. 10189 and 10380, 65-2 BCA par. 4928; *Shader Contractors, Inc.,* ASBCA Nos. 3957 and 4276, 58-1 BCA par. 1579; *Aetna Plywood & Veneer Co.,* ASBCA No. 2526 (1955); *Shader Contractors, Inc.* v. *United States, supra.* The argument can be no more effective here.

Finally, appellant has argued that each order by respondent is a separable contractual entity and that so considered, the minimum quantity order cannot be consideration for appellant's promise to supply generators in excess of the minimum quantity when ordered by the Government thereafter. There is no doubt that separate delivery orders, such

as respondent used here, can for some purposes be considered as separate contracts. The decisions cited by appellant are not, however, as clearly applicable as might seem. For here, the several orders which might be given are tied together among themselves and with the minimum order for each class of generator sets by a sliding scale of unit prices operating cumulatively. Thus each order can only be priced by reference to prior orders in each class. To that extent the contract on its face does not reflect the concept of separability of orders on which appellant relies. Moreover, to treat each D.O. given by respondent to appellant as a separate contract requiring its own consideration has been found by the Board to be contrary to the intent of the parties at the time when the contract was entered into. Just as the rule of "*Contra Proferentem*" will not be so applied, so appellant's separability interpretation will not be applied to thwart the intent of the parties.

Appellant was, therefore, bound to furnish to the Government generator sets, when ordered, up to the maximum quantity and, in the absence of a suitable price revision clause, at the prices stated in the contract.

IV

Appellant has argued that, even if the Board were to determine that appellant had entered into a binding contract for the delivery of up to 3600 generator sets, when ordered, the contract could not be used to reprocure 763 generator sets under D.O.'s Nos. 35775 and 41205, when respondent knew that this order would inflict a substantial loss upon appellant.

The contract, construed by the Board as binding upon appellant up to the maximum quantity for each class of generators, did not contain any limitation in its terms as to the causes or motives which might lead respondent to order generator sets from appellant within the maximum prescribed. As the events showed, the maximum was a generous

figure, for respondent ordered only 2,633 generator sets out of a possible grand total of 3,600. There was nothing in the contract, in particular, which restricted respondent to order only quantities which had not yet been ordered from other contractors. On the contrary, one would assume that the contract, with its flexibility as to the number of generator sets to be delivered thereunder, provided a suitable and ready means for reordering those quantities of generator sets which other contractors had failed to deliver. This Board has held that a contractor is not discharged from its obligation to furnish supplies in response to orders of the Government which were issued after the contractor had decided to discontinue the manufacture thereof as unprofitable and after the Government had become aware of this fact. *Standard Steel & Tube Corporation*, ASBCA No. 12076, 67-1 BCA par. 6199; *Lucas Aircraft Supply Co.*, ASBCA No. 11167, 66-1 BCA par. 5671. The same rule applies where the contractor continues in the business of manufacturing the supplies contracted for, as appellant here did. Hence, there was nothing in the direct contractual relationship of the parties which required respondent to forego its contractual right to order generator sets at the contract price, although at a loss to appellant.

According to appellant, the situation here is different because the Government is reprocuring supplies on the delivery of which the original contractor is said to have inexcusably defaulted, and for the excess costs of which in the event of reprocurement he is said to be liable. *Octagon Process, Inc.*, ASBCA No. 10371, 65-2 BCA par. 5168, is cited by appellant in support of the proposition that on reprocurement the Government may pass up the lowest price bid by a prospective reprocurement contractor, if such price is known to inflict a loss upon him, and reprocure at a higher price, charging the defaulted contractor with the difference. But that is not the proposition for which Octagon stands. All that this decision held was that, where the Government before award became aware of a low bidder's mistake and

hence was not entitled to hold him to his bid (see *Framlau Corp.*, IBCA No. 228, 61-2 BCA par. 3116), it fulfills its duty toward the defaulted contractor to mitigate damages by awarding the reprocurement to the next lowest bidder (who has thus become the lowest acceptable bidder).

Nor is the appellant served by the statement that reprocurement is not for the Government's account. The regulations which govern the contracting officer's conduct in letting reprocurement contracts require him to reprocure not, as appellant asserts (Br. p. 48), at a "reasonable" price but "at as reasonable a price as practicable" (ASPR 8-602.6 (a)), that is, at the lowest practicable price. If he fails to do so, for instance by not securing savings reasonably available, the amount of excess costs resulting from his failure is "unnecessary" and, hence, uncollectible. *National Robe Company,* ASBCA Nos. 11227, 11333, 67-1 BCA par. 6365.

Nor is there anything in the laws of the United States, applicable regulations, or the decisions of courts or contract appeals boards which requires a contracting officer to incur greater excess costs and thereby to create potential litigation and collection problems for the Government, when he can by permissible contractual action avoid or minimize the dangers presented by litigation as to the excusability or existence of a default, or the collectibility of the excess costs. Since respondent was entitled to procure the 763 Bogue units by ordering the same from appellant, the contracting officer was under no obligation to enter into an additional contract for their reprocurement unless he could do so at prices lower than appellant's.

It was perhaps this hope, tenuous as it might have been, which induced SAMA to issue RFP's for the reprocurement of the Bogue units. If so, such hopes were disappointed. In the ensuing negotiations SAMA adopted the idea of ordering the Bogue units under Contract No. AF 04(606)-15369. A memorandum making certain concessions to appellant (ASBCA No. 11918, R4 doc. V) was drafted by the SAMA

negotiators but was not accepted by appellant. Further price negotiations in March 1966 led to a tentative agreement on terms and prices, substantially higher than those listed in appellant's then-existing contract. This tentative agreement was, however, by its terms previously quoted, conditional upon availability of funds and approval by higher authority. Either or both must have been lacking for the agreement was not consummated, and in April 1966 the first of the disputed D.O.'s was issued to reprocure units which Bogue had failed to deliver. In the light of this record it cannot be said that SAMA's issuance of a RFP for the reprocurement of the Bogue units under a separate contract committed respondent to this course and, therefore, barred it from obtaining these units by D.O.'s issued under appellant's existing contract.

Consequently the issuance of D.O. Nos. 35775 and 41205 must be upheld as valid against the attack that they could not be used to procure or reprocure the units on which Bogue had defaulted.

V

Accordingly, the three appeals challenging the validity of the several delivery orders issued by respondent under Contract No. AF 04(606)-15369 must be, and they hereby are, in all respects denied.

Dated 26 January 1968.

/s/ RUDOLF SOBERNHEIM
Rudolf Sobernheim
Member of Division No. 7
Armed Services Board of
Contract Appeals

I concur

/s/ JOSEPH P. RAMSAY
Joseph P. Ramsay,
Colonel, JAGC
Member of Division No. 7
Armed Services Board of
Contract Appeals

I concur

/s/ LOUIS SPECTOR
Louis Spector
Chairman, Armed Services
Board of Contract Appeals and
Member of Division No. 7

I concur

/s/ DAVID ANTHONY BOTTE
David Anthony Botte, Colonel, USAF
Member of Division No. 7
Armed Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the decision and opinion of the Armed Services Board of Contract Appeals in ASBCA Nos. 11726, 11918 and 12161, Appeals of Federal Electric Corporation, rendered in conformance with the Board's Charter.

Dated: 1 February 1968

/s/ GEORGE L. HAWKES
George L. Hawkes, Recorder
Armed Services Board of
Contract Appeals

APPENDIX D

STATUTES INVOLVED

Armed Services Procurement Regulation

DISPUTES

§ 7-103.12

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: *Provided*, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

§ 8-701(a)

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (JAN. 1961)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

(i) stop work under the contract on the date and to the extent specified in the Notice of Termination;

(ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government;

(vii) use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (vi) above; *provided,* however, that the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may require any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and *provided further* that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct;

(viii) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(ix) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same; *provided*, that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(e) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer his termination claim, in the form and with certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing or granted by the Contracting Officer, upon request of the Contractor made in writing within such one year

period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or any extension thereof. Upon failure of the Contractor to submit his termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), and subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done; *provided*, that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(i) for completed supplies accepted by the Government (or sold or acquired as provided in paragraph (b)(vii) above) and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(ii) the total of—

(A) the costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e)(i) hereof;

(B) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b)(v) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts

shall be included in the costs payable under (A) above); and

(C) a sum, as a profit, equal to 2 percent of that part of the amount determined under (A) above which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under (A) above; *provided*, however, that if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(iii) the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract.

The total sum to be paid to the Contractor under (i) and (ii) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in

(e)(i) and (ii)(A) above, the fair value, as determined by the Contractor Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b)(vii).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the principles for consideration of costs set forth in Section XV, Part 2, of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contracting Officer under paragraph (c) (e) above, except that if the Contractor has failed to submit his claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the

Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; *provided*, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all his books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work termi-

nated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproduction thereof.

§ 8-602.6

Repurchase Against Contractor's Account.

(a) Where the supplies or services are still required after termination, repurchase of supplies or services which are the same as or similar to those called for in the contract, shall be made against the contractor's account as soon as practicable after termination. Such repurchase shall be at as reasonable a price as practicable considering the quality required by the Government and the time within which the supplies or services are required. The contract of repurchase may be made for a quantity in excess of the undelivered quantity terminated for default, when such excess quantity is needed, but excess cost may be charged against the defaulting contractor for no more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract).

(b) If the repurchase is for a quantity not in excess of the undelivered quantity terminated for default, the requirements of 10 U.S.C. 2304(a), with respect to formal advertising, are inapplicable. However, the contracting officer may use formal advertising procedures. If the contracting officer decides to negotiate the repurchase contract, he may either (1) use any authority listed in 3-201 through 3-217 (10 U.S.C. 2304(a) (1)-(17)), as appropriate, or (2) if none of those authorities to negotiate are used, the contract shall identify the procurement as a repurchase in accordance with the provisions of the Default clause in the defaulted contract. If the repurchase is for a quantity in excess of the undelivered quantity terminated for default, the entire quantity shall be treated as new procurement.

(c) If repurchase is effected at a price in excess of the price of the supplies terminated, the contracting officer

shall make a written demand on the contractor for the total amount of such excess giving due consideration to any increases or decreases in other ascertainable costs such as transportation discounts, etc., and shall take such other action as is required by Appendix E, Part 6, for collecting claims in favor of the Government.

* * * * * * * * * *

§ 1-309

Solicitations for Informational or Planning Purposes. It is the general policy of the Department of Defense to solicit bids, proposals or quotations only where there is a definite intention to award a contract or purchase order. However, in some cases solicitation for informational or planning purposes may be justified. Invitations for bids and requests for proposals will not be used for this purpose. Requests for quotations may be issued for informational or planning purposes only with prior approval of an individual at a level higher than the contracting officer. In such cases, the request for quotation shall clearly state its purpose and, in addition, the following statement in capital letters shall be placed on the face of the request: "THE GOVERNMENT DOES NOT INTEND TO AWARD A CONTRACT ON THE BASIS OF THIS REQUEST FOR QUOTATION, OR OTHERWISE PAY FOR THE INFORMATION SOLICITED." The foregoing does not prohibit the allowance, in accordance with 15-205.3, of the cost of preparing such quotations.

* * * * * * * * * *

Uniform Commercial Code, § 1-207

Performance or Acceptance Under Reservation of Rights.

A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as

"without prejudice", "under protest" or the like are sufficient.

* * * * * * * * * *

Defense Production Act of 1950, 50 U.S.C. §§ 2071-73 (1970)

TITLE I—PRIORITIES AND ALLOCATIONS

§ 2071. Priority in contracts and orders.

(a) Allocation of materials and facilities.

The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

* * * * * * * * * *

(b) Critical and strategic materials.

The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship. (Sept. 8, 1950, ch. 932, title I, § 101, 64 Stat. 799; July 31, 1951, ch. 275, title I, § 101(a), 65 Stat. 132; June 30, 1952, ch. 530, title I §§ 101, 102, 66 Stat. 296; June 30, 1953, ch. 171, § 3, 67 Stat. 129.)

§ 2072. Hoarding of designated scarce materials.

In order to prevent hoarding, no person shall accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation. The President shall order published in the Federal Register, and in such other manner as he may deem appropriate, every designation of materials the accumulation of which is unlawful and any withdrawal of such designation.

In making such designations the President may prescribe such conditions with respect to the accumulation of materials in excess of the reasonable demands of business, personal, or home consumption as he deems necessary to carry out the objectives of this Act [sections 2061, 2062, 2071 to 2073, 2091 to 2094, 2151 to 2163 and 2164 to 2168 of this Appendix]. This section shall not be construed to limit the authority contained in sections 101 and 704 of this Act [sections 2071 and 2154 of this Appendix]. (Sept. 8, 1950, ch. 932, title I, § 102, 64 Stat. 799; July 31, 1951, ch. 275, title I, § 101(b), 65 Stat. 132.)

§ 2073. Penalties.

Any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this title [sections 2071 to 2073 of this Appendix] or any rule, regulation, or order thereunder, shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both. (Sept. 8, 1950, ch. 932, title I, § 103, 64 Stat. 799.)

United States Constitution, Amendment V

* * * * * * * * * * *

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1757

FEDERAL ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A, 1a–14a) is reported at 202 Ct. Cl. 1028, 486 F. 2d 1377. The opinion of the Armed Services Board of Contract Appeals (Pet. App. C, 16a–38a) is reported at 68–1 BCA Para. 6834.

JURISDICTION

The decision of the Court of Claims was entered on October 25, 1973, and a timely motion for rehearing was denied on January 23, 1974 (Pet. App. B, 15a). By order of April 18, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 23, 1974, and the peti-

tion was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the procurement contract in this case, requiring a set minimum purchase by the government and giving it the right to make additional purchases up to a designated maximum amount within a specified time, was unenforceable by the government as to the additional purchases.

2. Whether the contract prohibited the government from ordering generators from petitioner, within the maximum purchase limit, because they were ordered to replace generators another contractor had failed to deliver.

STATEMENT

This suit under the Wunderlich Act, 41 U.S.C. 321–322, arose out of a contract between the United States and petitioner, Federal Electric Corporation ("FEC"), for the production and delivery of mobile generators. The contract, which was awarded FEC after competitive negotiations, required government purchase of 453 units at prices set in the contract and obligated FEC to supply a maximum of 3600 units at set prices on government orders issued within one year. Petitioner deliberately bid at a marginal profit to secure the contract to provide volume for a new plant (Pet. App. C, 17a–18a). After the government timely issued two delivery orders, totaling 459 units (Pet. App. C, 20a), petitioner claimed to have discovered that its contract bid contained pricing errors that would cause it a loss but gave assurances that it

was "making an all-out effort to meet our commitments" (Pet. App. C, 21a). Approximately one month later, petitioner asserted that because of lack of consideration for its undertaking to supply more than the minimum quantity set forth in the contract, the contract was unenforceable beyond the 453 minimum order quantity, that its promise to furnish up to 3600 units at contract schedule prices was merely a revocable offer, and that it was withdrawing its offer to deliver units above the 453 minimum order at contract prices (Pet. App. C, 21a–22a). Petitioner subsequently objected to delivery orders on the additional ground that the government would use the generators ordered to supply its needs resulting from the default of Bogue Electric Company ("Bogue") under a contract for similar generators (Pet. App. C, 23a–25a).

Despite these objections, petitioner continued to manufacture and deliver under protest the 2,174 generators subsequently ordered by the government under the contract, including 763 units to satisfy procurement requirements resulting from the default and termination of Bogue's contract. After the contracting officer rejected petitioner's claim that the contract was unenforceable above the minimum quantity (Pet. App. C, 22a–23a), petitioner appealed to the Armed Services Board of Contract Appeals (the "Board").

In a comprehensive opinion, the Board unanimously rejected petitioner's claim that the contract as a whole, or for procurements above the minimum quantity, was void for lack of consideration. The Board held that the government's obligation to order 453 units from petitioner for a purchase price of almost

$2.9 million is "sufficient consideration in law and hence an obligation and promise providing consideration for [petitioner's] counterobligation or promise, to deliver * * * units up to 3,600 at the agreed upon prices" (Pet. App. C, 28a–29a). Moreover, the Board stated that "In the light of the evidence which we have examined, we are compelled to find that [petitioner] did not intend" that the contract should be considered "as a revocable option contract" and did not advise the government of any such intent (Pet. App. C, 32a). The Board also unanimously ruled that there was nothing in the contract which prohibited the government from ordering units to replace units not furnished by another contractor; "[o]n the contrary, one would assume that the contract, with its flexibility as to the number of generator sets to be delivered thereunder, provided a suitable and ready means for reordering those quantities of generator sets which other contractors had failed to deliver" (Pet. App. C, 35a).

Petitioner then instituted this action in the Court of Claims for review of the Board's decision. The court unanimously rejected petitioner's contention that the contract was unenforceable and also rejected, over a single dissent, petitioner's contention that the Bogue reprocurement was improper. With respect to the first issue, however, the court did not reach the Board's holding that the contract itself was valid and enforceable *ab initio*,[1] but accepted instead the alter-

[1] However, in his concurring opinion, Judge Nichols expressed his view that the Board's reasoning on the issue of enforceability should be adopted *in toto* because he found it "simple, sound, and convincing" (Pet. App. A, 13a).

native ground that even if the contract had been unenforceable *ab initio,* petitioner's claim for increased prices must fail because an unenforceable contract becomes enforceable to the extent that it is performed (Pet. App. A, 6a–10a). In so ruling, the court relied upon *Willard, Sutherland & Co.* v. *United States,* 262 U.S. 489, which holds that a contested indefinite quantity procurement contract becomes enforceable, despite protest, to the extent that it is performed. The court distinguished its earlier decision in *Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 455 F. 2d 546, which had accepted "the contemporary view of performance under protest as restated in section 1–207 of the Uniform Commercial Code" ("UCC")[2] (Pet. App. A, 7a–9a). With respect to the second issue, the validity of the order for generators required as a result of Bogue's default, the Court of Claims, agreeing with the Board, held that the 763 additional units "were merely additional orders" under the contract with petitioner under which "the Government was free to order up to 3,600 generators within one year, regardless of the reason why said generators were needed. * * * The fact that these were reprocurement orders is relevant only to the Government's duty to mitigate damages to the defaulted contractor. In an effort to accomplish this goal, the contracting officer is not limited to specific methods of reprocurement, but rather is given broad discretion" (Pet. App. A, 11a–

[2] Section 1–207 provides:

"A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. * * *"

12a). Petitioner then petitioned for rehearing and argued for the first time that Section 1–207 of the UCC was applicable to this contract and required a contrary result on the first issue. The Court of Claims denied the petition for rehearing on January 23, 1974 (Pet. App. B, 15a).

ARGUMENT

Petitioner argues that this Court should grant its petition for a writ of certiorari to resolve a "conflict between the Court of Claims and the Second Circuit regarding the applicability of the UCC to disputes under Government contracts * * *" (Pet. 10).[3] But there is no such conflict.

The question of the applicability of the UCC presented by this case is not the broad one posed by petitioner but, as we show within, a much narrower one: whether, under the facts of this case, the Court of Claims was justified in following this Court's decision in *Willard, Sutherland & Co.*, supra, which held that a contractor who completely performs a disputed contract may not subsequently challenge the contract's basic enforceability, or whether the Court of Claims should have followed Section 1–207 of the UCC providing that performance under specific protest does not prejudice the rights reserved. As we also show, there is no conflict among the circuits on either issue. Finally, certiorari is not appropriate since the Court

[3] Petitioner's failure to raise this issue regarding the applicability of the UCC in the administrative proceedings generally precludes consideration of this issue by reviewing courts. *Ace Construction Co.* v. *United States*, 185 Ct. Cl. 487, 500, 401 F. 2d 816, 823. Thus, neither the Court of Claims nor this Court is required to reach this issue in reviewing the Board's decision.

of Claims' decision is correct on the independent ground that the contract here was plainly enforceable, as found by the Board. Thus, any contrast between the waiver theory of *Willard,* applied by the Court of Claims, and the non-waiver theory of UCC 1–207, is not truly at issue.

1. The principal argument in FEC's petition is that review by this Court is necessary to relieve "uncertainty and confusion" in the lower courts regarding the applicability of the UCC to disputes arising under government contracts (Pet. 8–11). Yet, as petitioner has conceded, the courts of appeals which have considered the applicability of the UCC (Pet. 14–15), as well as the Court of Claims (Pet. 15–16), have expressly acknowledged the growing authority and impact of the UCC on the federal common law of contracts.[4] In fact, the Court of Claims is a principal proponent of the UCC in federal contracting and, as petitioner notes, has frequently applied the UCC (Pet. 15). Moreover, petitioner admits that the Court of Claims previously applied the very section at issue here, 1–207, in *Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 455 F. 2d 546. Thus the real issue presented by this case is not whether the UCC is an important source of federal law, nor even whether Section 1–207 can be applied to government contracts; both of these questions have already been answered affirmatively by the Court of Claims. Petitioner's actual quarrel with the Court of Claims' decision is whether "[t]he *very same* UCC provision which was at issue in *Northern*

[4] Congress has not adopted the UCC as a rule of decision in federal procurement contracts.

Helex * * * was distinguished, erroneously, by the Court of Claims" (Pet. 16, emphasis in original). The Court of Claims' decision on this narrow question is correct and does not merit review by this Court.

The UCC cannot be applied mechanically to federal procurement because of the extensive coverage of government procurement regulations and the fact that the UCC was written for private not public transactions.[5] Thus, in the absence of legislation correlating provisions of the UCC and existing federal regulations, the courts must necessarily exercise some discretion in its application.

In *Northern Helex, supra*, where the government had unilaterally refused to pay for helium delivered under its contract and it was practically impossible to stop producing the helium without simply wasting it or to deliver it to anyone else, the Court of Claims, referring to these special circumstances, found the rule of UCC 1–207 applicable and held that delivery under protest did not preclude the supplier's right to sue for the purchase price under the contract. 455 F.

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[5] A commentator relied upon by petitioner has expressly recognized the problem in applying the UCC to federal contracting:

"Basically, government contract law and the legal principles contained in the Code represent two different types of legal machinery. The Code is built around layman's arrangements. On the other hand the government contract is not only a formal document calling for the furnishing of supplies and services, but also a vehicle for the implementation of public or administrative policies. A consequence of this dichotomy is that implementation of the Code in government-procurement cases may tend to be an unsettling influence in a multi-faceted and dynamic field of law." (Gusman, *Article 2 of the U.C.C. and Government Procurement: Selected Areas of Discussion*, 9 Boston College Ind. & Com. L. Rev. 1, 18 (1967), footnote omitted.)

2d at 552. Here, however, unlike *Northern Helex*, there was no breach of a contract by the government; FEC was not a supplier reacting to the government's deliberate breach but a contractor attempting to shift the cost of unilateral bidding errors or a deliberate underbid to the federal government. Had these alleged errors been remedied prior to submission of FEC's bid, there is no guarantee that the contract would have been awarded to FEC at all.[6] Moreover, FEC cannot even candidly assert that it was relying upon the UCC rule when it chose to perform the contract in 1966, as the record shows that the provisions of 1–207 were not even cited by FEC until raised by the Court of Claims,[7] and further shows that petitioner's perform-

[6] The Board noted that the cost analysis in FEC's bid showed a possible loss or minimal profit on the contract, and that the government accepted the bid only after receiving FEC's assurance that the bid was deliberately low to provide a volume needed by the FEC plant (Pet. App. C, 17a). FEC later claimed that it had made errors in figuring its bid, which would give a larger loss than anticipated, and sought additional compensation (*id.* at 20a–23a).

[7] Although there do not appear to be any decisions squarely on this point, it is also doubtful that Section 1–207 was intended to reach the situation presented here. As the comments indicate, the section was probably intended to allow a party to continue or to accept performance without waiver of rights under a concededly valid contract despite a disagreement regarding the interpretation of its terms. Thus, the section only preserves to the protesting party all its rights *under the contract's terms* and cannot serve as a basis for recovery beyond what could be recovered for breach:

"The section is not addressed to the creation or loss of remedies in the ordinary course of performance but rather to a method of procedure where one party is claiming as of right something which the other feels to be unwarranted." (ALI, Uniform Commercial Code (1957 Official Text with Comments), Sec. 1–207, Comment 2.)

ance was in furtherance of its own business interests (Pet. App. C, 17a, 30a–31a). Thus the instant case, an attempt to increase compensation under a contract while performing it, is fundamentally unlike the *Northern Helex* case.

2. Petitioner argues that *Willard, Sutherland & Co.* v. *United States, supra,* 262 U.S. 489, relied upon by the Court of Claims, is inapplicable to its contract because the contract's disputes clause compelled petitioner's performance (Pet. 17, 20–22). As the Court of Claims correctly recognized (Pet. App. A, 8a–9a), this is antithetical to petitioner's position that no enforceable contract existed. Moreover, petitioner's contract incorporated by reference only ASPR 7.103–12 (a)[8] which relates solely to "any dispute concerning a *question of fact arising under this contract* * * *" and therefore is inapplicable to petitioner's purely legal assertions that no contract ever existed. Cf. ASPR 7–103.12(b) (Pet. App. D, 39a). This Court has recognized that only claims arising under *clauses of the contract* requiring equitable adjustment are within the disputes clause, *Crown Coat Front Co.* v. *United States,* 386 U.S. 503, 506, n. 2, and that the disputes clause does not cover all disputes relating to the contract, *United States* v. *Utah Construction Co.,* 384 U.S. 394, 418. Since petitioner's claim is not within the scope of the disputes clause, the existence of such a clause manifestly does not distinguish this case from *Willard, supra.*

[8] Pet. App. D, 39a, emphasis added. The provisions of ASPR incorporated into this contract are set out in General Provisions—Fixed Supply Contracts, p. 2, no. 20. ASBCA No. 11726, Tab. A.

For disputes which are subject to the disputes clause, perhaps the vast majority of disputes, the Court of Claims has indeed recognized the inapplicability of the *Willard* rationale, recognizing that continued performance is required. See *Dynamics Corp. of America* v. *United States*, 182 Ct. Cl. 62, 389 F. 2d 424 (Pet. App. A, 8a–9a). This minimizes the difference between *Willard* and UCC 1–207 but does not eliminate the *Willard* waiver rule. Nor should it be eliminated. While the UCC rule serves the policy of encouraging performance during disputes, an additional policy must also be considered in federal procurement. A contractor should not be permitted to bid low to obtain a public contract and then litigate without risk to receive higher compensation. The limited disputes clause of government contracts, together with the *Willard* rule, serves to reconcile these two policies.[9]

3. Contrary to petitioner's assertion, the Court of Claims was not in error in rejecting petitioner's objec-

[9] Petitioner has also asserted that Department of Commerce directives as to this contract requiring performance (as a defence contract) distinguish this case from *Willard* (Pet. 17). This argument is without merit because the directives are not shown in the administrative record. Cf. *United States* v. *Carlo Bianchi & Co., Inc.*, 373 U.S. 709. Moreover, the departmental regulations permitting such directives also provide petitioner with an opportunity to protest them if they work a hardship. 32A C.F.R. BDSA Reg. 2, § 23 (1966 rev.). Petitioner failed to utilize this administrative grievance procedure and therefore cannot now be heard to object to the effect of such directives as may have been issued.

Petitioner is also inaccurate in asserting that the Government has admitted no contract existed (Pet. 21–22). As the Court of Claims recognized, the Government's position was that a binding contract existed, or, *in the alternative*, if the contract was unenforceable as drafted, it was enforceable to the extent performed (Pet. App. A, 7a).

tion to the two orders for generators necessitated by the Bogue default. Both tribunals below correctly recognized that petitioner was obligated to supply up to 3600 generators, and the cause for the government's orders was of no consequence to petitioner so long as the orders did not exceed 3600 units.[10] To accept petitioner's argument would deprive the government of needed flexibility in scheduling procurements, a flexibility it bargained for in the terms of the contract. See *Astro-Space Laboratories, Inc.* v. *United States,* 200 Ct. Cl. 282, 470 F. 2d 1003.

4. Even if the Court should disagree with the applicability of the *Willard* rule by the Court of Claims in this case, the substantive decision of the Board and the Court of Claims remains correct: the contract was enforceable and binding. Under the terms of the agreement, the government promised to order and did order 453 generators at contract prices.[11] In return, FEC promised to fill government orders for a period of one year not to exceed a total of 3600 generators. As the Board properly held, the government's promise to buy and its purchase of the 453 units for a total price of nearly $3 million

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[10] The Government ordered and received 2633 generators or 73% of the contractual maximum.

[11] Pet. App. C, 20a. The Board expressly found in accordance with its prior holdings that the minimum order quantity was "'not optional' with but obligatory upon [the government]" (Pet. App. C, 27a).

Petitioner has also asserted that the standard termination clause (Pet. App. D, 40a–48a) relieved the government of the obligation to order even the minimum requirement (Pet. 4). This interpretation of the clause was expressly rejected by the Board (Pet. App. C, 33a).

constituted sufficient consideration to support FEC's return promise to supply additional units to a stated maximum figure for stated prices (Pet. App. C, 27a–32a). The Board's decision is correct,[12] and this ground is fully dispositive of petitioner's suit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1974.

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[12] In addition to the authorities cited in the opinion, see Opinion of the Comptroller General, *U.S. Compressed Gas Company*, No. B–160063, February 10, 1967, and 1A Corbin, *On Contracts*, § 157, p. 46 (1963 ed.) (emphasis added):

"A promise to supply on stated terms all the goods or services that the promisee may thereafter order is not itself an illusory promise. Instead, it is a very definite promise that creates a large power in the promisee. *It is an enforceable promise if the promisee gives any sufficient consideration for it.* The consideration may be anything that the promisor bargains for and that is given in exchange for it."

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IN THE

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v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY BRIEF FOR PETITIONER

Petitioner, Federal Electric Corporation, hereby respectfully replies to the brief for the United States in opposition to the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Claims in this proceeding. Pursuant to Rule 24, this reply is limited exclusively to issues and/or arguments raised for the first time by respondent in its brief.

1. Respondent misstates the central question presented in this proceeding. The question is *not* whether petitioner's contract with the Government "was enforce-

able by the Government as to the additional purchases" above the minimum quantity set forth in the contract. Because of *Willard, Sutherland & Co.* v. *United States,* 262 U.S. 489 (1923), the Court of Claims never directly confronted the enforceability issue.[1] Rather, the question presented here is whether, contrary to the decision of the Court of Claims in this case, the Uniform Commercial Code (UCC) is the federal law applicable to disputes under Government contracts in the absence of otherwise applicable federal regulations, as has been held by the Court of Appeals for the Second Circuit and other federal courts.

It is important for this Court to resolve the serious conflict in the law which has resulted from the Court of Claims' interpretation of this Court's *Willard, Sutherland* decision. As described more fully in the Petition at pages 8-22, that conflict has created substantial confusion and uncertainty as to the function of the UCC in resolving Government contract disputes. Resolution of the conflict is essential to protect the Government and its contractors—as well as the federal courts—from the multiplicity of litigation which inevitably results from confusion with respect to the applicable law.

Respondent asserts that the Court of Claims unanimously rejected petitioner's contention that the contract was unenforceable (Br. in Opp., p. 4). The court did no such thing. Actually, the court refused to follow the Board on the legal issues and refused to decide whether or not the contract was enforceable (Pet. App. A, p. 7a). The court decided the case on entirely different grounds than the Board, albeit erroneously. The court stated:

> In deciding for the Government with regard to the enforceability of the FEC contract, *we depart from* the Board's reasoning. [Pet. App. A, p. 6a; emphasis added.]

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[1] The court stated: "We deem it unnecessary to resolve the issue of enforceability *ab initio* . . ." (Pet. App. A, p. 7a)

2. Respondent argues that there is no conflict between the decision of the Court of Claims in this proceeding and prior decisions of that court and of the United States Court of Appeals for the Second Circuit. Yet, respondent describes the conflict in its brief and the uncertainty and confusion in the law created by the Court of Claims decision. Respondent acknowledges that the Court of Claims declined to follow the modern trend of its own decisions and the decisions of other federal courts, including the Second Circuit. Those decisions recognized the applicability of the Uniform Commercial Code to the resolution of Government contract disputes in the absence of otherwise applicable federal procurement regulations. The UCC is the "federal common law" of contracts. *See* the discussion of Supreme Court and Court of Claims cases and cases from the Second, Fifth and Seventh Circuits, all supporting this principle, on pages 12-16 of the Petition.

Despite the recent trend of its own decisions and the unanimous authority of other federal courts, the Court of Claims reluctantly held that UCC § 1-207 could not be applied to petitioner's action in this case. UCC § 1-207 [2] permits "performance under protest" and effectively complements the modern Disputes clause mandatorily inserted in Government contracts. However, the court below felt compelled to follow this Court's 1923 decision in *Willard, Sutherland & Co.* v. *United States, supra,* which held that an indefinite quantity Government contract was enforceable to the extent it was performed, *regardless of a prior protest.*

Willard, Sutherland was rendered by this Court more than 50 years ago, some 30 years before the publication of the first edition of the UCC by the American Law Institute in 1952. The contract in *Willard, Sutherland* did not contain a Disputes clause. The Court of Claims recognized

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[2] UCC § 1-207 provides: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved . . . ."

that it was faced with the Hobson's choice of either following an "elderly" Supreme Court precedent and thereby creating a conflict in the law, or following the "contemporary view" of performance under protest in UCC § 1-207 at the risk of undermining the authority of a Supreme Court decision. The court stated:

> Though we might find persuasive the contemporary view of performance under protest as restated in Section 1-207 of the Uniform Commercial Code and accepted by the court under the special circumstances of the *Northern Helex* case, we hesitate to extend this view in the face of a clear, contrary rule established and affirmed, albeit a half century ago, by the Supreme Court. We are reminded in this connection of the Court's recent expression of "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of [the Supreme] Court." *United States* v. *Mason*, 412 U.S. 391 (1973). [Pet. App. A, pp. 9a-10a]

Thus, respondent's argument that there is no conflict here is wide of the mark. The Court of Claims itself recognized that such a conflict did, in fact, exist. The conflict here is one between the pre-UCC law as stated by this Court in *Willard, Sutherland* (and adopted by the court below in this case) and the current law as reflected in the UCC, prior Court of Claims decisions and the decision of the Second Circuit in *United States* v. *Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966). It is now critical to the efficient administrative and judicial resolution of disputes under Government contracts that this Court act promptly to dispel the confusion and uncertainty regarding the applicability of the UCC to such disputes.

3. Respondent argues that petitioner did not rely upon the Uniform Commercial Code in support of its case before the Armed Services Board of Contract Appeals (ASBCA) or in the Court of Claims. In fact, petitioner did advise respondent that the contract was unenforceable, rescinded the contract, but agreed to perform under protest at

respondent's insistence. It was clear to the Court of Claims that petitioner was following UCC § 1-207 without calling it by name.

Moreover, the Disputes clause in petitioner's contract specifically required performance under protest, as permitted by the UCC. The Court of Claims recognized this in its opinion where the court held that regardless of the UCC and the Disputes clause in petitioner's contract, performance under protest was not permissible here because of this Court's decision in *Willard, Sutherland.*

Although the Court of Claims failed to recognize the paramount importance of the Disputes clause in this proceeding, it has in the past acknowledged that the presence of a Disputes clause in a contract makes the UCC "performance under protest" rule applicable, and renders inapplicable on its facts *Willard, Sutherland* and other early cases. On analogous facts in *Dynamics Corp.* v. *United States,* 182 Ct. Cl. 62, 77-78, 389 F.2d 424, 432-33 (1968), the Court of Claims considered the Government's argument that the contractor is not obligated to perform. Relying on *Willard, Sutherland* and other cases, the Government contended that the contractor had waived its right to recover by performing. Rejecting that argument, the Court of Claims stated:

> *The problem with defendant's argument is that it overlooks the clear mandate of the disputes clause,* which reads as follows:
>
> > Pending final decision of a dispute hereunder, the Contractor shall proceed and in accordance with the Contracting Officer's decision.
>
> *It is the absence of such a clause which distinguishes the earlier cases cited by defendant from the instant case.*
>
> • • • •
>
> In short, *the disputes clause in the instant case compelled plaintiff to comply with defendant's directions, and plaintiff's delivery of goods under protest did not*

> *act to deprive plaintiff of its right to recover beyond the terms of the contract.* [Emphasis added.]

The Court of Claims in *Dynamics* also noted, correctly, that the Disputes clause in Government contracts "protects an important interest of the Government" in obtaining needed supplies and equipment, despite contractual disputes. It would "defeat the salutary purpose" of the clause if Government contractors such as petitioner were required to refuse to continue performance in order to preserve their contract rights (182 Ct. Cl. at 78, 389 F.2d at 433). This is exactly what the Court of Claims would require petitioner to do on the basis of *Willard, Sutherland* and what respondent now proposes to the Court.

4. Finally, respondent argues that this case is not distinguishable on its facts from *Willard, Sutherland* because, although petitioner's contract contained a Disputes clause, the dispute in this case was not subject to the clause. This argument is exemplary of respondent's effort to shift the focus of attention in this Court from the serious issues raised in the Petition. Throughout the long course of the administrative and judicial proceedings in this case respondent never questioned the applicability of the Disputes clause, and the jurisdiction of the ASBCA thereunder. Respondent did not allege in the Court of Claims that the Board lacked jurisdiction of the case but rather sought affirmance of the Board decision. The court also did not question the jurisdiction of the Board under the Disputes clause.

Respondent's assertion that the Disputes clause is not applicable to this dispute reflects a misunderstanding of the disputes procedure. The narrow interpretation of the Disputes clause which respondent proposes is entirely inconsistent with this Court's interpretation of the clause in *United States* v. *Utah Constr. Co.*, 384 U.S. 394 (1966), and *United States* v. *Carlo Bianchi & Co.*, 373 U.S., 709 (1963). *See Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 757, 763-64, 345 F.2d 833, 837 (1965).

CONCLUSION

In summary, respondent has attempted in its brief in opposition to the Petition to shift the attention of the Court from the serious issues raised in the Petition. Respondent on the one hand seeks to apply the legal conclusions of the Board which were specifically rejected by the Court of Claims, and on the other hand to claim that the Disputes clause was inapplicable and that the Board lacked jurisdiction over the case.

The real issues here are clearly apparent from a reading of the Court of Claims decision. They involve the role of the UCC in resolving Government contract disputes in the absence of otherwise applicable federal statutes and regulations. They pose the question of the vitality of this Court's 1923 decision in *Willard, Sutherland* in the present UCC environment. It is these issues which have created the conflict between the decision of the Court of Claims in this proceeding and the decisions of other federal courts, including the Second Circuit, and the consequent uncertainty and confusion in the law and which only this Court can resolve.

WHEREFORE, for the foregoing reasons and for the reasons set forth in the Petition, a writ of certiorari should be issued to review the decision of the Court of Claims in this proceeding.

Respectfully submitted,

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